IMPERIAL UNITY
AND THE DOMINIONS

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IMPERIAL UNITY AND THE DOMINIONS

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TO

THE RIGHT HONOURABLE LEWIS HARCOURT, M.P.

IN RECOGNITION OF

HIS GREAT SERVICES TO THE CAUSE OF IMPERIAL UNITY

AS

SECRETARY OF STATE FOR THE COLONIES

1910–1915

PREFACE

The loss of life and the expenditure of money incurred by the self-governing Dominions in the prosecution of a war in whose inception they had and could have no responsibility have brought into prominence the question of the possibility of so revising the relations of the several parts of the Empire as to prevent a recurrence of the anomaly. The demand for closer unity is insistent, but the difficulties of any federal system, as the foremost authority on the English constitution, my friend, Professor A. V. Dicey, has recently shown, in the Introduction to the last edition of the *Law of the Constitution*, are both numerous and formidable.

The view that the self-governing Dominions are sister nations of the United Kingdom has been expressed both by Mr. Lyttelton and Mr. A. J. Balfour, but neither rhetoric nor philosophy must blind us to law and fact. Doubtless, equality and fraternity are the ideals to be aimed at, but the mode of their realization is the fundamental problem of Imperial relations at the present day. The Dominions have been, and still are, dependencies of the United Kingdom: but the system of colonial autonomy, with which the name of Sir Wilfrid Laurier will in history be honourably associated, has brought them to a degree of power and prosperity which bids us believe with Sir Robert Borden that their national consciousness will not be satisfied indefinitely with

a subordinate position in the Empire. Two paths are open for this development of nationhood: in the first place, the Dominions may be encouraged to attain complete independence and to become units of international law, in the hope that they will enter first into alliance and later into federation with the United Kingdom; in this case the unity of the Empire will be broken up in the hope of the achievement of greater unity in days to come. In the second place, there may be devised some plan by which the Dominions may share with the United Kingdom the control of foreign policy and take their definite share in the defence of the Empire; this course has the obvious advantage that the unity of the Empire suffers no breach, and no violent change of any kind is needed to bring it about, but the difficulties of devising a practical system are serious and must not be underestimated. Nor can their solution be a matter of rapid action; patience is essential for the evolution of an imperial constitution, nor in any final solution will the position of India and the Crown Colonies be ignored.

No attempt is made in this book to suggest any final solution of a problem so great and so dependent on the change of circumstance. It is its aim to set out, in Part I, the actual facts regarding the limitation of the autonomy of the self-governing Dominions, and to suggest in what matters these limitations might be relaxed in favour of the Dominions, while in Part II are set out some considerations affecting the possible modes in which Imperial unity can be attained. In view of the fact that the history of responsible govern-

ment up to 1911 has been given in my *Responsible Government in the Dominions*, the subject-matter of Part I has been in the main drawn from the events of the last four years, which have been years of high importance in the development of self-government.

One word of explanation may be given in regard to the terminology employed. 'Self-governing Dominions' or more shortly 'Dominions' is the technical term, first invented at the Colonial Conference of 1907, for the aggregate of the five colonies possessing responsible government—Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, and Newfoundland. 'Crown Colonies' denotes all the colonies which do not possess responsible government, and which therefore are under the control of the Crown as regards their executive government. The term has unfortunately in recent years been abandoned as a collective term by the Colonial Office out of a wish to defer to the ill-informed desire of some West Indian communities to avoid the use of a title which in their opinion denotes that their legislatures are controlled by the Secretary of State for the Colonies; their opinion is wholly unhistorical, and it may be hoped that in course of time the historical expression will prevail over the monstrosity of 'colonies not possessing responsible government', which has been coined to replace it. To the use of the adjective 'colonial' it may be trusted that no exception will be taken, since it has been endorsed by the action of Mr. Bonar Law, who is not merely Secretary of State for the Colonies but is proud to have been born in the Dominion *par excellence*.

Freedom from the restrictions of an official position has enabled me to express more freely my views on the actions of both Dominion and Imperial Ministries. The press assumption that in every controversy between the Dominion and Imperial Governments the latter is invariably wrong does more credit to the chivalry of the United Kingdom than to its historical judgement, but such complaisance is inadmissible in a serious discussion.

For assistance in the preparation of this work I am indebted to my wife.

A. BERRIEDALE KEITH.

November, 1915.

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INTRODUCTION

THE immediate cause of the origin of responsible government in the British Dominions was the outbreak of rebellion in Canada, which convinced the Imperial Government of the day that the system of government then in force in that Colony had ceased to serve even the elementary purpose of maintaining public order. It became clear that some form of administration must be devised which would obviate the recurrence of rebellion in close proximity to the frontier of a power which might without much injustice be suspected of being not unwilling to see the disappearance of monarchical government from the American continent; but it was not less certain that the form chosen must be such as to obviate any possibility of the separation of the Colony from the mother country, a contingency which from the period of the War of American Independence was always painfully present to the minds of those responsible for the conduct of colonial affairs. The solution then adopted, in large measure at the instigation of Lord Durham, was to leave to the colonists, to the greatest extent possible, the control of those affairs which could properly be described as local, while reserving control in those matters which could be held to affect the Empire as a whole. To concede full responsible government was, Lord John Russell argued, impossible, if it was meant by this that the Government of the Colony should be at liberty to manage all the affairs of the country in the same unfettered manner as the affairs of the United Kingdom were managed by the Imperial Ministry, for that Ministry could not permit disloyalty to flourish in the country as it had done in Lower Canada under Papineau; but nevertheless it was possible to allow the affairs of the Colony to be managed for the most part by the Governor as representative

of the Imperial Government on the advice of those who could command a majority in the elected House of the Legislature.

True to the compromise to which it owes its origin, responsible government has always, throughout its history of three-quarters of a century, exhibited the character of a qualified freedom. Unquestionably the history of its operation has always tended in one and the same direction: restrictions which originally were enforced and considered of importance have gradually been allowed to lapse, as public opinion in the colonies became more articulate in favour of freedom from control, or public feeling in the mother country recognized that there had ceased to be sufficient reason for the exercise of that control. In this development both colonial impatience of restraint and Colonial Office reluctance to exercise it co-operated: colonial statesmen might consider that Imperial statesmen were unduly tenacious of rights of supervision, but it is doubtful if, with the possible exception of Lord Carnarvon, there was in the nineteenth century any Secretary of State for the Colonies who did not accept and endeavour to follow the principles laid down for himself by Earl Grey, that the interference of the Home Government in the affairs of the colonies should be exercised as rarely as possible, and that when exercised it should, whenever possible, be restricted to the form of advice. Nor was this attitude at all surprising: the great distance of the important colonies, with the exception of Canada, rendered any effort at control singularly difficult and troublesome, and the great majority of holders of the office of Secretary of State were men who, whatever their interests, were not anxious to create troubles for themselves in colonial problems, finding sufficient scope for their energies in those difficulties which presented themselves unasked. Nor in any account of the influences which favoured the development of freedom from restraint should mention be omitted of the influence on Secretaries of State of the permanent officials of the Colonial Office: their education and training, especially before the system of open com-

petition was applied to the recruitment of the office, were not such as to encourage qualities of mind which made for interference in what could be left alone, and this attitude of *laissez faire*, which was in harmony with the spirit of the period when responsible government grew to maturity, was undoubtedly the cause why so much liberty was attained by the colonies with, comparatively speaking, so little friction.

From the beginning of responsible government it was clearly recognized that the relaxation of the bonds of union between the colonies and the United Kingdom must suggest the final solution of the connexion between them and the mother country. On the one hand, it was pointed out, the colonies might well desire to obtain complete freedom and to enjoy the rank of independent nations subject to no external control: the mere bond of loyalty to a common sovereign would not avail when in a few generations the memory of the place of origin had come to an end, and still less in cases where no such common origin had ever existed. On the other hand, experience showed that colonial troubles were the chief causes of foreign difficulties endangering the United Kingdom, which would do well to cast from its neck the millstones of the wretched colonies and let them fight their own battles.[1] To this argument a reply from the side of the colonies was soon adduced in the statement that, so far from the United Kingdom running risk of foreign wars through the possession of colonies, it was the colonies which ran risks of invasion through their connexion with the United Kingdom, which involved them in the danger of war provoked by European combinations in which they had no interest. Thus in the period before confederation in Canada the Imperial Government endeavoured to convince Canada that she was under obligation to make every effort to provide for her own defence, since it was through Canadian interests that any danger of conflict with the United States would arise, while the

[1] See the quotations from Sir J. Stephen, H. Merivale, Sir F. Rogers, Disraeli, and others, in J. S. Ewart, *Kingdom Papers*, i. 32–44.

Canadian Government persisted in the view that, wh
anxious to do anything possible to aid in the defence
the Empire, Canada could not but expect that the ma
burden of expenditure would be undertaken by the Unit
Kingdom, since it was merely through her connexion wi
that kingdom that Canada ran any risk of war. Neith
contention, either then or now,[1] can be regarded as bei
strictly correct. The connexion between Canada and t
United Kingdom undoubtedly, even in the case of t
United States, involved dangers for Canada: the irritati
felt in the United States over the sympathy which it w
thought England manifested for the Confederate States
the War of Secession naturally turned the eyes of man
Americans to the possibility of accomplishing the policy s
before the States in 1812 of uniting Canada with the rest
the northern portion of North America by force of arm
if not by the simpler method of purchase. Some thirt
years later the militant attitude of the United States ove
the question of the Venezuela boundary might have pro
voked a less pacific power than the United Kingdom t
enter upon a struggle in which Canada would have bee
exposed to the greatest danger. If the war with the Boe
republics, though technically involving Canada in hostilities
did not and could not in itself bring any risk of injury t
Canada, the same cannot be said of the great war of 1914
But on the other hand must be set the fact that for many
years Anglo-American relations were rendered difficult and
every now and then dangerous owing to the fishery questions
affecting Canada and Newfoundland, questions in which the
United Kingdom had not the slightest direct interest.
From the termination of the reciprocity treaty with the
United States in 1866 until the conclusion of the Treaty of
Washington in 1871 there was constant risk that the efforts
made by the British Government to protect the Canadian
fisheries from encroachment by American fishermen would
result in war, and the termination of the provisions of that
treaty in 1885 marked the beginning of a fresh period of

[1] *Kingdom Papers*, i. 311.

difficulty, which was enhanced by the claim put forward by the United States on the strength of inheritance from Russia to dominion over the Behring Sea. Sir Charles Tupper, then High Commissioner for Canada, records in his account [1] of the efforts made by him to secure action by the British Government that he warned Lord Salisbury in 1890 that, if prompt action were not taken to prevent the United States carrying out its threat to seize ships flying the British flag when catching seals in the Behring Sea, Canada could only come to the conclusion that the British flag was not strong enough to protect her. The result was that the British Ambassador was instructed to inform the Secretary of State of the United States that if the British flag was interfered with the United States must be prepared for the consequences, and in deference to this warning immediate orders were sent to the United States cruisers not to carry out the instructions to seize British vessels which had been given to them. The Behring Sea question was finally disposed of by the arbitration at Paris in 1893, but the older fishery question revived itself in 1906 when the Newfoundland Government made an unwise effort to secure the ratification by the United States of the commercial convention negotiated in 1902 [2] by Sir Robert Bond with Mr. J. Hay, the United States Secretary of State, by adopting a policy of insisting on the rigid enforcement of the treaty of 1818 regarding the rights of the United States fishermen in the Newfoundland fisheries. Fortunately the good sense of the United States Government and the resolve of the Imperial Government to secure a reasonable settlement prevented matters drifting so far as happened in 1890, but it was not until the arbitration of 1910 [3] that the fishery question received, if not a final settlement, at least so much definition as renders it almost impossible that it should ever again present the possibility of danger of hostilities between the two countries.

Even in the case of Canada, however, the balance of

[1] *Recollections of Sixty Years*, pp. 209, 210.

[2] See *Parl. Pap.*, Cd. 3262.

[3] Ibid., Cd. 5396 and 6450.

advantage can be shown to have been clearly on the side of the Dominion. The greatness of Canada lies in the fact that the whole of the North American continent north of latitude 49°, with the unimportant exception of Alaska, is united under one supreme Government, and this could never have been effected except through the protection of the United Kingdom, which prevented the American occupation of the west and of British Columbia, secured the addition to the Dominion of the North-West and of Rupert's Land, and thus opened the way to the creation of a new and powerful nation. The same consideration applies in even greater force to Australia and New Zealand, whose long and slow growth to national stature, still far from complete, has been rendered possible only by the power of the United Kingdom, which has preserved for both lands, which their scanty population could not have held for a moment against any invader. It is the habit to lay stress on the failures in policy of statesmen of the past and to emphasize errors made by them, such as the unsatisfactory boundaries of Eastern Canada, the fishery rights of Americans and French in Canada and Newfoundland, and the presence of other foreign nations in the Pacific. It would perhaps be more just if less interesting to lay stress on their great achievements in preserving for the Empire all the lands of first-rate importance: all the possessions of foreign powers in the Pacific which might by any process of reasoning be considered as having fallen to these powers through any negligence of British statesmen could not compare in value for a moment with the island of Tasmania. Even in South Africa, in which the disadvantages of British administration have revealed themselves far more fully than in any other part of her dominions, due recognition must be accorded to the statesmanlike policy of conciliation which has after much tribulation produced a Union in which it may be believed in due course conflicting ideals may yet be reconciled, a view encouraged by the overwhelming defeat of the Nationalists in the general election of October 1915.

There are other important advantages which have been derived by the self-governing Dominions from the connexion with the United Kingdom. Apart from the possibility of development in security from external influences which is the chief boon conferred by British control, these countries have profited by the free use of British capital, in some cases assisted by guarantees of government loans by the Imperial Parliament, by a steady stream of British immigration, and by the protection afforded in foreign countries to the persons and interests of British subjects of Colonial origin by the diplomatic and consular officers of the United Kingdom. In the first two cases the advantage derived has been mutual: the Colonies have paid the interest on the loans contracted by them, the emigrants have flourished and benefited themselves, and indeed often those whom they left in the mother country. But that a benefit is mutual does not alter the fact that it is advantageous, and while precision of valuation is impossible, it is quite certain that neither loans nor population would have been forthcoming from the United Kingdom in equal measure and on equal terms to countries not under the British Crown. In the case of the advantages conferred by the use of the diplomatic and consular service and of in the last resort the authority and power of the United Kingdom the gain must be considered as being wholly on the one side. The people of Australia, New Zealand, Canada, Newfoundland, and South Africa have thus enjoyed in China, in the Turkish Dominions, in Morocco, in Siam, and in Persia the valuable exterritorial privileges assured to British subjects, privileges which as independent powers they could hardly have won for themselves, while in the rest of the world the representatives of the United Kingdom have in matters great and small, in questions of trade and of personal liberty, vindicated with constant vigilance the rights of British subjects of Colonial origin.[1] The wrongs of Canadian sailors in Uruguay and of a shipping firm of New South Wales in the Marshall Islands have been redressed as

[1] See Mr. Borden's speech in Canadian House of Commons, Dec. 5, 1912.

effectively as any grievances of British subjects pertaining to the United Kingdom, and the whole cost of the diplomatic and consular services has been borne by the Government of the United Kingdom, without complaint or hesitation.

It would of course be idle to pretend that the advantage of the connexion of the Colonies with the United Kingdom has been all on the one side. It has been clear gain to the latter to have a fair field for investment and for emigration in lands which are under the British Crown. It has always been a cause for national pride that the United Kingdom has colonies in number and extent far superior to that of any other country and that the British Empire is the greatest known to history, and if this was the case in the days when it was believed that in time of stress no military aid could be expected from the Colonies, the feeling has been greatly intensified by the decision of the Dominions in the case of the Boer War and in far greater measure in the case of the European War to aid the mother country with all their resources and power. It was indeed not believed by any sane statesman that the stress of a European war would reveal any flaw in the unity of the Empire; the conception that the British Dominions would seize the opportunity of a struggle involving the existence or at least the independence of the mother country to declare themselves independent was a chimera which could be hatched only in a disordered brain, but it was legitimate to feel doubt how far these Dominions would feel themselves bound to take active part in a war which was brought on without consultation with them being possible and under conditions which they inevitably could hardly completely realize. The analogy of the Boer War was clearly not conclusive. In that case the feeling of the Dominions had been attracted to the support of the Uitlanders in the South African Republic, many of whom were of Colonial origin. The long drawn out negotiations had been followed by them with care, and the struggle assumed in their eyes an effort to secure constitutional liberties on reasonable terms. Moreover, the war appeared to have been deliber-

ately forced on the British Government by the republics at a time when the British preparations for war were quite incomplete, and when war was not desired by the British people or Government. The jealousy of foreign powers was observed, and it was felt just and proper to assist fellow colonists in South Africa when the Cape and Natal were invaded by enemy forces. Nor can it be overlooked that to many of those who volunteered the conflict afforded prospects of excitement and enterprise welcome to the bold and hardy characters of young Canadians, Australians, and New Zealanders. In point of fact events showed that the Dominions realized the seriousness of the issues in the European War, and recognizing that liberty and democracy were on their trial, responded to the need by organizing with all seriousness and earnestness forces on a scale wholly unexpected alike by the British people and by the enemies of the allied powers.

The response of the Dominions at the hour of greatest peril may be deemed sufficient answer to the theory that the Dominions seek independence of the mother country and desire to set themselves up as independent nations. The difficulties in the way of such ambitions are obvious and important, even assuming, as it can doubtless be safely assumed, that the United Kingdom would not seek to deny independence to any Dominion which deliberately decided that such independence was desirable, after the whole question had been submitted to the free judgement of the electorate under a democratic franchise. In the case of the Australasian Dominions, the presence of a great power of the first rank with a large population and no large available territories for that population to occupy would compel an independent Australia to rely for security upon an alliance with one or other of the only powers whose aid could possibly preserve the country from annexation in whole or part, the United Kingdom and the United States of America. Alliance with the United Kingdom after a declaration of independence would only be procured on terms which would be at least as onerous as the former

connexion under a common Crown, and despite the wave of enthusiasm which passed through Australia on the occasion of the visit of the United States fleet in its famous cruise to Japan, it would be rash in the extreme, as is clearly recognized in the Commonwealth, to assume that the great republic would for no obvious advantage to itself undertake the grave task of defending a distant ally whose territory is singularly open to attack and whose resources are still comparatively undeveloped. The independence of New Zealand and South Africa would of course be still less capable of defence. With Canada matters are different, for commercial considerations present great possibilities of advantage from the union of the Dominion with the United States, and the fact that the establishment of close reciprocity between the two countries might result in annexation was recognized in 1891 by no less cool a judgement than that of the Hon. Edward Blake, when he found himself unable to persist in the policy of the Liberal party in Canada in favour of close trade connexions with the United States.[1] Twenty years later the same issue divided Canada into two hostile camps, and a scheme of reciprocity resulted in the defeat by an overwhelming majority of a Government which had seemed perfectly secure of office, and which in its general policy had certainly never shown itself deficient in sense of Imperial obligation. It appears clear, therefore, that the destiny of Canada, despite the great influx of American citizens to take advantage of its wealth in farm lands, does not point to absorption in the great republic, nor is it certain that the ideal of such absorption is looked upon in the United States with as much favour as at an earlier date, partly no doubt because any attempt to assimilate so vast an accession of territory might alter beyond recognition the fundamental divisions of American party politics.

But if independence is not the ideal of responsible statesmen in any Dominion, and if dreams of independence are only vaguely held here and there among isolated units of

[1] Cf. Sir C. Tupper, *Recollections of Sixty Years*, pp. 304 *seq.*

the population of these Dominions, it is a different thing with the growth of national feeling in the Dominions. The rise of such a feeling was quite inevitable and in every way desirable: it was present in germ from the beginning of self-government, but it has come to fuller development only since the people of the Dominions realized that national development was only possible under conditions showing national spirit. It was unquestionably right that in the early days of her history Canada should devote her resources to providing means of transport to unite the east and west of the Dominion rather than to equipping armed forces on land and on sea, and that Australia should bend its efforts to subjugating nature rather than to providing the fleet without which her coasts would be overrun by others desirous of sharing the potential riches of the country. But the scanty resources which rendered this policy desirable and right were not compatible with that self-reliance which must characterize a real nation. There is on record a striking recognition of this fact in the report of certain members of the Victorian Royal Commission on federation in 1870.[1] It was there pointed out that the Colony of Victoria and the other Australian Colonies were in many respects separate States connected only by a personal tie with the United Kingdom, with parliamentary institutions of their own, with an executive entirely of local appointment with the exception of the Governor, with separate revenues, and even with separate armed forces, and it was suggested that the grant by the Crown of the power of making independent treaties was all that was required to set the Colonies up as independent States united to the United Kingdom only by the possession of a common Sovereign in a relation analogous to that which formerly existed between the Ionian Islands and the British Crown. But the framers of these proposals, who included Sir G. Berry and Sir Gavan Duffy, were evidently conscious that the armed forces which the Colonies possessed were not of the character suitable to the protection of an independent nation, for they pinned

[1] See *Responsible Government*, iii. 1155.

their faith on the recognition of their neutrality which they hoped, from the humanity shown by the great powers in the adoption of rules forbidding privateering and protecting private property at sea, would readily be accorded by these powers. The naïve faith shown thus in treaties is only equalled in absurdity by the further proposal that the adoption of this attitude would not in any way prevent the Colonies from coming to the aid of the mother country if she were attacked, such aid possessing all the greater value because of their being independent States. It is hardly surprising that nothing further came of this remarkable exposition of international law.

The situation is now changed when Australia, New Zealand, and Canada have forces which cannot be regarded on any theory as negligible and when Australia possesses the nucleus of an effective Navy in place of the old gunboats which constituted the naval defence possessed by the Australian Colonies in 1870. Countries which have the power to supply themselves with effective protection or even with substantial protection may justly claim that they have outgrown a Colonial status, may resent the phrase 'our Colonies' used fondly of the Dominions by the average inhabitant of the United Kingdom, may insist that the title Dominion or Commonwealth should be replaced by Kingdom, and may even seek to compel the abandonment of the term Colonial as applied to self-governing possessions or, more properly, countries. The eradication of the adjective Colonial from the English speech is doubtless impossible, but it is common ground with all responsible statesmen that all possible steps must be taken to further the national life within the Empire of the self-governing Dominions. Nor is it doubtful that this end is to be obtained in one way only, the encouragement of the greatest autonomy in self-government coupled with the creation of closer bonds of union between the several parts of the Empire as a whole. The first part of this proposition is self-evident: any check to the growth in self-reliance of the peoples of the Dominions would be a calamity; but the

second part is not less indisputable. No Dominion could possibly by whatever extension of its national life be as great as the British Empire; even if Canada possesses the most highly educated, the most hardworking and the most intelligent of the people of the world, nevertheless in organic connexion with forty-five millions in the United Kingdom and five millions in Australia they may hope to reach yet a higher destiny than can await them as Canadians only. Canada herself and the Commonwealth represent aggregates of independent units, nor can any one doubt that the life of Canada and the Commonwealth is fuller and better than that of the units from which they have emerged could have been: even five years have done not a little to broaden the outlook of South Africa, and the difficulties of the task should not make us despair of any solution for the problem of the self-governing portions of the British Empire other than the loose alliance which some believe is all that is possible. But the attainment of true organic unity for so great an Empire and so diverse elements scattered widely in space is a task far exceeding that of any federation yet accomplished, and it may well be that the form which ultimately will be evolved will be one which has no existing parallel.

In the meantime it is certain that the efforts of statesmen must be bent on removing as far as is practicable all grounds of friction between the several parts of the Empire, and on promoting unity of sentiment and action upon common problems. These questions must present themselves for partial solution as far as may be practicable under existing circumstances at the next Imperial Conference, and it is therefore of interest to consider in the first place what are the existing limitations of the independence of the self-governing Dominions and in what degree they can be relaxed without injury to the framework of Empire, and in the second place what means there exist of effecting a closer union between the several parts of the Empire.

PART I. THE LIMITATIONS OF THE AUTONOMY OF THE DOMINIONS

A. THE GOVERNOR

CHAPTER I

THE APPOINTMENT OF THE GOVERNOR

In all Colonies of the Empire the rule is observed that the appointment of the head of the executive government is vested in the Crown. It is recognized that while the executive government must be vested in the Crown, nevertheless it cannot normally be exercised by the Sovereign in person, and must be carried on by a representative, styled Governor-General in the case of federations and Governor in the case of unitary Dominions and of the Australian States, which preserve within the federation of the Commonwealth a certain independence. This fact entitles them to a position superior to that of the provinces of Canada or the Union of South Africa, which is indeed in essence a unitary Government, though some appearance of federal institutions has been preserved. In the case of the federations and the Union, which owe their existence to the action of Parliament alone, the power of the Crown to appoint a Governor-General rests upon the express provisions of the constitution Acts: in the case of the unitary Dominions and the States of Australia the office of Governor is indeed recognized by Dominion statutes, but it is created by Letters Patent under the Great Seal of the United Kingdom, and the actions of the Governor are regulated by these Letters Patent and by the Instructions under the Signet and Sign Manual which are issued along with the Letters Patent. Even in the case of the federations and the Union,

similar instruments have been issued in supplement of the bare authority of appointment contained in the Acts creating the constitutions. The actual individual officer is appointed to the post of Governor-General or Governor by a Commission under the Sign Manual and Signet, which serves as the authority for the swearing in of the new officer in supersession of the old commission.

In making the appointment of a Governor—by which term a Governor-General may conveniently [1] be included—the Crown must naturally act on the advice of the Imperial Ministry of the day. There is, of course, no legal necessity that this should be the case, but it is a maxim of the British constitution that any act of Government in the British Islands carried out by the Crown must be authorized by the responsibility of a minister, and thus in all cases of appointment responsibility is assumed in the first instance by the Secretary of State for the Colonies, and in the second place by the Cabinet and Prime Minister for the time being. Formally this responsibility is indicated by the countersignature of the Governor's commission by the Secretary of State, and in practice a Secretary of State may be called upon to defend the selection of a Governor which on his advice the Crown has seen fit to make ; as for instance in 1913 when the appointment of Sir W. Ellison Macartney was challenged on his selection for the Governorship of Tasmania on the ground that he had been at one time an Orangeman and would therefore not prove acceptable to the Roman Catholic elements in the State. Practically, of course, the appointment is not made on the sole authority of the Secretary of State : appointments to important Governments are matters in which the Prime Minister must be expected to take a certain direct interest, and it is an acknowledged part of the royal prerogative that no person should be submitted for appointment as a representative of the Crown whose appointment would be distasteful to the Sovereign. Nor is it doubtful that the Ministry of the day would give all possible consideration to any suggestion

[1] So in Canadian Statutes the Governor in Council is used.

for the filling of an important post which might be made by the Crown, the selection of men for the highest posts in the Dominions being obviously a matter in which the judgement of the King would have peculiar value.

The question naturally presented itself at a comparatively early date whether the power of choice could not be shared in some degree by the Colonial Government. The matter was definitely raised in a somewhat acute form by the decision of the Imperial Government in 1888 to appoint as Governor of Queensland a distinguished officer, Sir Henry Blake, who had just served a period as Governor of Newfoundland.[1] The feeling in Queensland ran at that moment somewhat high; the late Governor, Sir Anthony Musgrave, whose distinction had been won in Crown Colonies and who was not familiar with the niceties of responsible government, had thought it his duty to exercise a personal discretion in a case of the proposed exercise of the prerogative of mercy. The exercise of this discretion was formally permitted by the royal instructions then in force, nor in all probability was the discretion of the Governor at fault; there is nothing more difficult than the due exercise of the prerogative of mercy in a small community, when everything tends to bring pressure on ministers to remit penalties which, however just, are offensive to the majority or even a considerable minority of the people in the locality in which the offence was committed or the criminal lives. The Ministry of the day resigned, and as there was no Imperial interest involved, it was impossible to maintain the action of the Governor, whose death followed shortly after. It was not unnatural in all the circumstances that the Queensland Government should have been anxious to secure a man of long experience in self-governing Colonies, and at the same time South Australia approached the Secretary of State for the Colonies with the request that the Government might be informed in confidence of the name of the officer proposed as the next Governor so that if necessary any objection might be taken to the proposed appointment before it was formally made.

[1] See *Parl. Pap.*, C. 5828.

The Parliament of New South Wales a little later enunciated the view that any future Governor of that Colony should be a man of parliamentary experience in the United Kingdom. The Secretary of State for the Colonies persisted, however, in the view that much as he would like to share the work of choice of a suitable Governor with the Colonial Governments the task was one which was impartible ; if a Governor were in any sense the nominee of a Colonial Ministry he might be held to have lost his claim to be impartial, especially in the very delicate matter of exercising the right of the Governor to grant or refuse a request for a dissolution of Parliament ; moreover, a Governor had duties to perform not merely as head of the Colonial Government but also as an Imperial Officer, and the Secretary of State must, therefore, remain responsible for the selection. The claim that colonies should receive Governors with parliamentary experience was noted, but it was pointed out that in point of fact it would be difficult to induce men with such experience to give up their careers at home for the sake of Governorships, and stress was laid on the fact that the rule, if adopted, would have excluded from office many of the most distinguished Governors of the past. The difficulty was, however, solved in the case of Queensland by Sir Henry Blake tendering his resignation in view of the objections raised by the local Government, and while declining to regard these objections as satisfactory ground for the refusal to accept him, the Secretary of State made another and more acceptable selection for the office. In point of fact, though the formal claim of the Colonial Government was thus rejected, it was thought best shortly afterwards to adopt the rule that the local Government should be asked before any appointment was formally made whether the name of a proposed appointee was in any way objectionable to them. The result has normally been to elicit an acceptance, and this fact is of great value to the Colonial Secretary in making his selection : in a few cases objection has been taken on some ground or other, and in them the wishes of the local authorities have been respected: the transaction has

remained fairly [1] confidential, and the rejected candidate has not been placed in the mortifying position of being rejected by a Colonial Government probably for utterly insufficient reasons. There is also one conclusive reason to render consultation requisite in that it is obviously most improper that an officer whose appointment has received the royal approval should be rejected by the Colony which he is to govern.

Can the policy of consultation be carried further and the Governor be made in effect a nominee of the Dominion Government ? This question has not been as yet of practical importance save in the case of the States of Australia. In them it has been canvassed from time to time and a certain amount of popular support for the appointment of local candidates has manifested itself ; on two occasions labour Governments, that of Mr. Price in South Australia in 1908, and that of Western Australia in 1913, have put forward reasoned arguments in favour of the alteration of the practice by which Governors are chosen from men whose work and whose family connexions lie outside the Commonwealth. In effect the arguments in favour of this movement are that the post is one which could be suitably filled by a local man, that such an appointment would permit of economies being effected, it being a fixed belief with many members of the labour party in Australia, that the very moderate salaries now paid to the Governors of the States are princely incomes imposing an undue burden on the resources of the States, and that it is not fair that a man should be debarred from appointment because he is an Australian by birth. A further suggestion which, however, has not officially been put forward by any Government is that the duties of Governor should be combined with those of Chief Justice, and it has been pointed out in support of this argument that in the event of the absence on leave of the Governor—and Governors of States at one time were fond of taking some six months' leave in the course of their term of office, formerly of six

[1] Actual proposed appointments are normally allowed to leak out by ministries, but not rejections of candidates.

and now of five or six years' duration—the Chief Justice acts in his stead without difficulty or inconvenience.

The arguments against the proposal are of weight. The combination in the hands of one man of both the control of the executive government and of the Chief Justiceship is anomalous in theory and in practice would be likely to result in difficulty; in point of fact the Chief Justices of the important States of Victoria and New South Wales when acting as Governor have been in the habit of ceasing the performance of their duties as Chief Justice. It is doubtful whether in the long run the States are really anxious to see the salaries of the posts made so low that they could only be accepted by local men who were prepared to abandon the social side of the Governor's functions; in fact, if not in theory, the view prevalent is rather that a Governor should not be unwilling to pay something for the honour of serving as the representative of the Sovereign. The choice of local men, whether the selection be confined to natives of the State as was suggested by Mr. Price or to natives of Australia as was the view of the Government of Western Australia, might have the advantage claimed that he would be more likely to avoid any action which would run counter to Colonial feelings, but this result is very problematical. What is much more probable is that the person selected would be a man who had played a part in local politics, and who would inevitably be accused of abusing his authority as Governor in order to further the interests of the party with which he had formerly been in political sympathy. It must be remembered that the communities forming the States are still comparatively small except in the case of New South Wales and Victoria, and that the selection of a man wholly detached from party politics would be difficult, and the readiness which prevails to attribute improper action to local men can be judged from the fact that so persistent were the allegations that a Chief Justice of Tasmania had made improper use of information acquired by him when acting as Governor that the Government of the day found it advisable to have the charges examined and refuted

by a formal investigation. An officer appointed from outside may be guilty of indiscretions and may commit errors of judgement, but it is impossible to consider that he has been actuated by improper motives. A still more important consideration lies in the fact that while the Imperial duties of State Governor are not of substantial extent or importance he should serve as a supporter of art, literature, and higher culture generally in a way which can hardly be expected of a man who *ex hypothesi* has spent his life in the limits of the Commonwealth. Yet a further reason against the adoption of the proposal is the fact that the constitution of the Commonwealth plainly contemplates that the Governors of the States like the Governor-General should be appointed by the Imperial Government without regard to considerations of local origin. This point is one of the consequences of the clear differentiation between the constitution of the Commonwealth with the quasi independence of the States and that of Canada in which the provinces are in certain matters definitely subordinated to the central government of the Dominion, and in which in harmony with this fact the Lieutenant-Governors are chosen by the Governor-General in Council, naturally from among ex-politicians. Nor has the position of Lieutenant-Governors been preserved at the high level of Governors selected by the Imperial Government, and appointed by the King; it is characteristic that when Sir Charles Tupper learned that Mr. I. Tarte was in a position to establish charges of corruption which would have driven Sir H. Langevin from office in the Dominion Cabinet in 1891, his first idea of a solution of the difficulty was to suggest to the Prime Minister that Sir H. Langevin should be appointed Lieutenant-Governor of Quebec.[1] Nor can it be denied that it is precisely in the provinces of Canada that Lieutenant-Governors have interpreted in the widest possible sense the powers which are vested in their hands.

Considerations like these have probably availed to prevent the claim for local appointments being made more vocal in

[1] See *Recollections of Sixty Years*, pp. 214, 215.

the Dominions, though the elective Governor is a phenomenon which is not unknown in labour circles. The present method of appointment indeed seems to serve as effectively as almost any that might be devised. It is open to a Dominion Government if they feel a desire for any special person as Governor to mention the matter informally to the Secretary of State, and no Dominion Government is compelled to accept any Governor to whom it can take exception. The result has been in the main to provide excellent heads of the Government, and to make as adequate a substitute as the very different conditions permit for the actual presence of the person of the Sovereign. The only alternative scheme is one which has been suggested of late from time to time, but which has not yet established itself and which must, therefore, be considered as still on trial. The retirement of Earl Grey from the Government of Canada in 1911 was followed by the appointment of the Duke of Connaught for a period of two years in the first place, a tenure of office afterwards extended by a year and then prolonged until the end of the war. Before, however, this event changed the course of happenings, the proposal had been made to Canada and accepted that he should be followed in office by H.S.H. Prince Alexander of Teck. It is impossible not to see in this scheme a design to treat the post of Governor-General as something of very high importance, in which place should be found for a royal or semi-royal personage, and the position was clearly recognized in the Dominion. It has produced diverse expressions of opinion, and it must be admitted that the opinion of Canada would not accept the doctrine that the post must be held by a person of royal blood; such a doctrine would offend the sense of democracy of many who have no tinge of American connexion, nor would it be acceptable to that very considerable body of Canadian opinion which from connexion, often of blood, with the United States has a sentimental objection to monarchy. The mere suggestion that the Duke of Connaught was to be followed in office by Prince Arthur of Connaught produced the most clear expressions of hostile opinion, based

on no personal defect of a popular Prince, but on his youth and inexperience of affairs which unsuited him for the holding of the most distinguished place in the Dominion. On the other hand, the fears of an introduction of the practices of a royal court which were widely entertained on the appointment of the Duke of Connaught, as with less ground they had been entertained on the appointment of the Marquess of Lorne, were dispelled by the adherence of His Royal Highness to the régime of his predecessor, and the distinguished public career of the Duke, added to his competence in business and charm of manner, secured his wide popularity in the Dominion. But this is far from indicating that there is any possibility of the acceptance whether in Canada or in any other Dominion of the theory that the representative of the Sovereign should be a royal prince, still less of the suggestion that such Governorships should be hereditary in a branch of the royal family. Difficult as is the problem of providing Governors for the Dominions, it has yet to be shown that the present method is not the best attainable; the election of a Governor would offend radically against the principle of responsible government and would raise up in the Dominion a power which, resting on an elective basis, would tend to compete with the authority of the Prime Minister himself.

CHAPTER II

THE POWERS OF THE GOVERNOR AS RESTRICTED BY LEGAL LIABILITY

It is a fundamental principle of the Government of the United Kingdom that the whole executive authority of the kingdom rests in the hands of the Crown, that this authority is exercised in every case on the advice of ministers, and that for every act of the King which is done in his official capacity a minister of the Crown must be responsible. It is further established that the King can do no wrong, and that therefore, if wrong is done, it cannot have been done by the command of the King, and the wrongdoer must answer to the law for his action, whether criminally or civilly. Liability, whether criminal or civil, is measured by the ordinary law of the land: the doctrine of Act of State cannot be invoked by a government official against any person but a foreigner,[1] and the only protection possessed by public authorities in the case of British subjects and in the case of foreigners generally is that afforded by certain rules regarding the period of time within which action may be taken and the form of procedure to be adopted in such action. The application of the same principle, the following of the rules of the common law, results in what is sometimes regarded as anomalous, the position of the official who contracts in the name of the Crown. The rule is that he is not personally liable on such a contract, since a man cannot be held liable on a contract which he makes for a disclosed principal, and yet as the Crown cannot be sued the Crown cannot be held to be directly liable. The procedure by petition of right, however, remedies this defect, and though it is true that the royal fiat is required before a petition of right can be brought and that, therefore,

[1] See Harrison Moore, *Act of State*.

theoretically the remedy for breach of contract on the part of the Crown can be denied by the Crown, it is an established part of constitutional usage that the fiat should be granted whenever a prima facie case for inquiry by a court is shown.

There is no difficulty in conceiving that the position of the Governor might have been assimilated in these matters to the position of the Crown in the United Kingdom. It seems clear that the Lord-Lieutenant of Ireland is as exempt from suit in respect of any of his official actions as the Crown in England, and that a claim preferred against him would not be entertained by the courts, nor would any attempt be made to subject him to the criminal law in respect of any official action. The position of the Governor in these respects is quite different; it was early realized that the position of Governor at a great distance from the mother country would be seriously abused if no means of punishment existed, and criminal acts of Governors are liable to be punished in England under the provisions of the old Acts 11 and 12 Will. III, c. 12, and 43 Geo. III, c. 85, though fortunately these Acts have not been effectively invoked against a Governor for over a hundred years. More important is the fact that civil actions can be brought against a Governor in the courts of the Dominion in which he is Governor and also in the courts of the United Kingdom for torts committed by him, and such actions have been brought from time to time within recent years. The Governor is not liable for contracts entered into by him on behalf of the Crown, for in that case the principle applies as in England that only the principal can be sued, but contrary to the principle adopted in England, by local legislation direct suit against the Crown in cases of contract is allowed in the Dominions, while in many of them this privilege of suit is extended to torts. The difficulties arising from the liability of the Governor to actions both in England and in the Dominion is mitigated by the fact that by English law an action on tort brought in England must be based on the fact that the act in question must be tortious both by the law of England and by the law of the place in

which the action took place, and that accordingly if by an Act of Indemnity the tortious character of the act is removed in the Dominion, then the basis of an action in England disappears; thus in the case of *Phillips* v. *Eyre*,[1] which arose out of the action of the notorious Governor Eyre in putting down with undue severity the revolt of the negroes in Jamaica, it was decided that the effect of an Act of Indemnity passed by the island legislature, even though that Act had been assented to by the Governor whose acts were impugned, was nevertheless sufficient to deprive his proceedings of any tortious character, and to relieve him from liability in civil proceedings in England. On the other hand, this doctrine does not apply to criminal proceedings under the Acts of Will. III and Geo. III, nor to proceedings for murder or manslaughter under the Act 24 and 25 Vict. c. 100, which authorizes the trial and punishment in England of these offences when committed anywhere abroad by a British subject, for no Colonial Act can operate to destroy the effect of an Imperial Act unless there is express authority in some other Imperial Act for this purpose. But the effect of this anomaly could at any time be made good by the decision of the Crown to enter a *nolle prosequi* if proceedings were taken by any private individual against a Governor. The same proceeding is available in a Dominion to prevent the actions of a Governor being examined criminally there, though there seems to be no doubt that in theory a Governor even for his official actions is liable to the criminal jurisdiction of the Dominion courts in the absence of express legislation to the contrary. In his private capacity he is of course liable both civilly and criminally.

In the case of the self-governing Dominions it may be argued that the application of the old Acts is out of date, and that they should be formally removed from the statute book in their application to such Dominions. The total repeal of the measures might be held to be unadvisable in view of the fact that in some of the smaller Colonies the Governor occupies a post of such authority and power that

[1] 4 Q.B. 225; 6 Q.B. 1.

in the hands of an unscrupulous man injury might be done to individuals which could not be adequately met by mere civil proceedings. But the larger question naturally presents itself whether the Governor of a self-governing Dominion or State should not be placed as regards all his official actions in a position more nearly akin to that of the Lord-Lieutenant of Ireland and made exempt from all form of legal process as regards any official act done by him, leaving the responsibility for illegal acts, if any, to be borne by the officers who carried them out. It is, of course, true that even as the law at present stands these officers may be held to be liable for the acts in question, but obviously, if they are authorized by the Governor, it is natural and proper that proceedings in respect of them should be directed not against mere subordinates but against the head of the Government, who is much more likely than any subordinate to be able to meet the damages which might be awarded. Moreover, as an action in England would normally only be possible when the proposed defendant was resident in the country, an action there would normally [1] have to be directed against a Governor during his presence in England on leave of absence or immediately after retirement from the administration of his government.

The matter is not of academic interest because the operation of the rule places the Governor in a position of difficulty with regard to the conduct of the Government of the country and compels him to share in some degree with ministers responsibilities which he ought not to have to bear. The two most prominent instances in which the Governor finds himself in difficulties are in connexion with the expenditure of public money and the declaration of martial law. In both instances he may quite easily find himself in the position of having to decide either to approve illegal action and thus to render himself liable to suit, or to decline to permit ministers taking action which they can assure him is essential in the interest of the country; normally indeed he has no

[1] This follows from the rules of the High Court as to service of process abroad.

real choice; he cannot as a rule hope to secure other ministers if he dismisses those whom he has, he cannot rule the country without ministers, and so he is compelled to agree to the proposals of ministers and thus to put himself without any real option of choice in a position of incurring legal liability.

In the case of Crown Colonies the practice has always prevailed under which the expenditure of money may be authorized by the Governor if approved by the Secretary of State for the Colonies before the amount in question has been appropriated by the Legislature. This procedure is applicable because the Legislature of a Crown Colony in the narrower sense of the term is one which is controlled by the Secretary of State through the Governor, and therefore its sanction to expenditure approved by the Secretary of State can always be relied upon. In the Dominions the transition from Crown Colony control to the forms of responsible government has naturally enough not been effected without leaving traces of the older forms, and there has been from time to time in varying degree a tendency for Ministries to secure expenditure in anticipation of the authority of Parliament.[1] The expenditure is later on brought before Parliament and formally sanctioned, but the practice is obviously open, unless regulated, to objections; the Opposition in Parliament can see that the matter is reduced to a farce when they are asked to authorize the expenditure of moneys which have been paid out and which, therefore, are already beyond their power of control. More serious is the fact that the Upper House is inclined to resent any attempt made to force its hand by the use of sums which have not been brought before them for approval, especially in those cases in which, as in South and Western Australia and Tasmania, the Upper House has nearly equal power over money Bills with the Lower House.

The intervention of the Governor is required in all the cases of the expenditure of public money, for in accordance

[1] In England the rule is normally observed, but exceptions have occurred; see the case of the Treasury action in July 1901, referred to in the case of *Bowles* v. *The Bank of England*, *Times*, Oct. 22, 1912.

with the old practice under Crown Colony government, he is required by the Audit Acts to sign every warrant for the issue of public money by the Treasurer. This provision must, it is clear, as a mere matter of law be read subject to the express provisions contained in every Dominion and State constitution that the consolidated revenue fund can be appropriated only by the Parliament, and, though the Constitution Acts do not expressly[1] provide that no warrant may be signed by the Governor except on the strength of an appropriation by Parliament, it is clear that, if the interpretation that a Governor could sign warrants without such appropriation were adopted, the result would be that two different and not necessarily harmonious forms of dealing with public money would be provided, which is absurd. Any appropriation, therefore, must be made by Parliament, and it is only when this is done that the action of the Governor is possible, if the law is to be strictly followed.

Now it is obvious that to carry out this scheme it is necessary that the Ministry of the day should secure that Parliament is summoned to meet at such times and that such business is brought before it as will ensure that the necessary appropriations of public money shall be duly made for each financial year, or that in the alternative power should be given to the Government, in the event of the passing of an appropriation measure not being carried through in good time, to expend money on the basis of the expenditure authorized by Parliament for the previous year. There would still remain the case of urgent expenditure which it was necessary to incur when Parliament was not in session, and which arose from causes not foreseen, and legislative authority to expend sums in anticipation of formal authority could also be given. These devices have been, as is clearly right, widely adopted in the Dominions and States;[2] thus, in

[1] It was so provided for the provinces of the Union in 9 Edw. VII. c. 9, s. 89, but modified in Act No. 10 of 1913, s. 17.

[2] Thus, in the Union, Act No. 21 of 1911 by s. 26 allows special warrants for unforeseen needs or excesses on foreseen services up to £300,000, but subject to appropriation by Parliament not later than the next session. For South Australia cf. *Parl. Pap.*, Cd. 6091, p. 50.

South Australia in order to meet the difficulty of appropriation without legal authority Acts were passed in 1911 and 1912 (Nos. 1065 and 1087) which permit the Governor to appropriate within clearly defined limits sums for the support of the ordinary needs of Government and an additional sum of money not exceeding £50,000 for unexpected needs arising when Parliament is not in session. Another and simpler device is that of the Treasurer's Advance, which is adopted very freely by the Commonwealth of Australia and in Western Australia, but which is recognized also in the other States, but even this expedient has been criticized. Thus, in Western Australia in 1913 the Legislative Council protested against the action of the Government regarding the direction in which the advance to the Treasurer sanctioned in Act No. 17 of 1912 had been applied, despite the fact that the sum was to be subject to appropriation for the defined purposes for which it had been used in the Appropriation Act of the year in which it was expended.[1]

Notwithstanding the existence of these provisions, cases constantly occur in the Dominions and States where expenditure has to be incurred without the approval of Parliament being previously obtained.[2] In Queensland when Mr. Kidston resigned office in 1907 as a result of the refusal of the Governor to give him an assurance as to adding members if necessary to the Legislative Council in order to overcome its resistance to the measures regarding wages boards and voting proposed by the Government, it was necessary for the Premier who succeeded him to ask the Governor to issue warrants for expenditure amounting to some £700,000 without Parliamentary authority, and the illegality of the Governor's action was strongly condemned by the Opposition, who threatened when in power to refuse

[1] It has been argued that in view of the *Audit Act*, No. 12 of 1904, of the State appropriation by warrant is (s. 31) contemplated without Parliamentary sanction being first required, but this cannot be pressed. The *Audit Act* cannot override the Constitution Act of 1890.

[2] Most often when Parliament is dissolved as a result of governmental difficulties, e. g. in 1911 in Canada when Sir W. Laurier appealed to the people on the Agreement with the United States.

to ratify the expenditure, though fortunately when the defeat of Mr. Philp at the polls resulted in the return of Mr. Kidston to power wiser counsels coupled with new political tendencies rendered it unnecessary to fulfil the threat. The procedure, however, was in so far legal that the Governor was actually asked to issue warrants; in the case of the dissolution of the Parliament of Victoria by Sir T. Gibson Carmichael at the request of Sir Thomas Bent in 1908, the necessary means of carrying on the business of the State had to be provided without any legal authority at all, and the committee which examined the question of the procedure followed could not suggest any very effective way of meeting the case, although it was discovered that in granting a dissolution the Governor had inquired of the Premier and had received a formal assurance that the Treasury was provided with funds to carry it over until Parliament should meet and vote further sums. The difficulty of the position of the Governor when he is asked to act in these cases is further illustrated by the case of the action of the Government of the Transvaal, just before the expiry of the Transvaal Legislature on the occasion of the coming into effect of the Union; anxious to reward its supporters and to make compensation in some degree to them for their losses through the disappearance of a full Colonial Parliament on the formation of the Union Parliament and the reduction of the status of the local legislative body, the Transvaal Ministry secured the authority of the acting Governor for the issue of the full salary which would normally have been paid for a complete session to each member. The courts of the Transvaal pronounced the action clearly illegal,[1] but found that there was no appropriate form of action in which the steps taken to pay the money could be checked, and much criticism was naturally directed

[1] *Dalrymple and others* v. *Colonial Treasurer*, [1910] T.P. 272. Technically the Government evaded flagrant illegality by waiting until Parliament was not in session and then presenting the warrant for signature on the ground that the expenditure was urgently required and Parliament was not in session; see Lord Crewe's defence in the *House of Lords Debates*, July 25, 1910.

not merely locally against the Governor amongst those who considered the action taken in the light of a disgraceful waste of public money on an illegitimate object, and the carrying through by executive action of a proposal which could not have been enacted legislatively owing to the objection which would have been taken by the Legislative Council, but also in England both against the Governor's action, and against the Imperial Government for permitting the action. The criticism in a sense was erroneous, for the interference of the Imperial Government would obviously have been motived by no Imperial interest, and the acting Governor was advised by his ministers that his action was proper, but it is perfectly clear that the action of the Ministry was indefensible, since not only did they evade the decision of the Legislative Council, but they took this action at a time when they evaded the responsibility which might otherwise have been brought home to them by the vote of the electors to whom they owed their power, since as the Parliament was on the verge of abolition, they had never to face the same electorate again. Nothing can more clearly illustrate the desirability of removing from a Governor all liability for his action, and the assimilation of his position in this respect to that of the Crown in the United Kingdom. Rigid adherence to the rule of law is impossible; even when the law is reasonably wide in terms, as in Canada and New Zealand, excess expenditure has from time to time to be incurred, and even in a case like Newfoundland, where a considerable unauthorized expenditure results annually from the practice of underestimating all requirements, the theory that the Governor is responsible is unsound and tends to obscure the real facts of the position by throwing over the acts of the Ministry the aegis of the King's representative.

The case of the declaration of martial law is a still more glaring example of the absurdity of the theory that the Governor is legally responsible for the acts of his ministers, and the case is the more serious in that, while the means of bringing a Governor to book for signing warrants without legal authority are by no means obvious, there exists no

such difficulty in the case of acts done under martial law. In the case of expenditure without Parliamentary authority there exists no certain form of procedure to punish a Governor, assuming that he has not been guilty of appropriating the money to his own use; it does not seem that any court would issue an order prohibiting expenditure, nor is it easy to see by whom an action for the expenditure of the money could be brought. In the case of acts done under martial law the liability of the Governor to proceedings not merely in the Dominion or State is in full effect, and a local Act of Indemnity can only bar civil action in the United Kingdom; even if it is very improbable that criminal proceedings could ever be successful, the attempt has been made in recent years to make them effective, and the trouble which might thus be involved upon a Governor is not one which he should fairly be called upon to undergo, when as must be the case with a Governor of a self-governing Dominion or State the action taken was not his own, as was that of Governor Eyre of Jamaica, but that of his ministers.

It may indeed be contended, as was done in the case of the proclamation of martial law in Zululand of December 3, 1907, by critics of the Government of Natal on whose advice the proclamation was issued by Sir Matthew Nathan,[1] contrary to his own judgement of the necessities of the case, that it is desirable to maintain the personal responsibility of the Governor and not to throw it upon ministers, since thus the Governor is required to exercise a personal discretion, and is able to act on his own judgement, and on the instructions of the Secretary of State for the Colonies. It is, however, impossible to accept the argument thus put forward. The essence of a proclamation of martial law, when made under the royal prerogative as it is now normally made in every self-governing Dominion and State, is that it asserts the intention of the Government to exert in a state of disorder all the powers which are inherent in the Government for the maintenance of the public peace, and also if need be powers which go beyond even the extraordinary

[1] See *Parl. Pap.*, Cd. 3888, pp. 174, 194.

authority which every Government possesses at law in time of overthrow of public order. The common law of England, which is the common law of nearly all the self-governing Dominions, and the common Roman-Dutch law which prevails in South Africa agree in allowing no inconsiderable latitude to the Executive in the repression of disorder, but experience has shown that it is necessary in order to cover all the acts which take place in the suppression of a disturbance to obtain from Parliament an Act of Indemnity for what has been done in good faith in the suppression of disorder. The existence of a state of public unrest is a matter which must be better understood by ministers than by the Governor or the Secretary of State, and therefore *prima facie* the declaration of martial law is a matter on which the Governor should act on the advice of ministers. Moreover, as an Act of Indemnity for what is done is required as much by ministers as by himself in acting on this advice, he has the full assurance that in doing so he will find the action of his Government supported by the Parliament and that the necessary Act relieving him from legal responsibility in the Dominion or State will be passed into law. What probability is there that a Governor who refuses to proclaim martial law at the request of a Ministry will find other ministers to face the situation? In the particular case of Natal doubtless the unprejudiced judgement will consider that Sir Matthew Nathan was right in holding that the declaration of martial law was premature, but no one will doubt that he was in the right in subordinating his own views to that of his ministers after he had by expressing his opinion done all that lay in his power to show them the more correct aspect of the matter.

But, while the general principle cannot be seriously contested on constitutional grounds that a Governor should be freed from personal liability in respect of a declaration of martial law and should act on the advice of ministers in declaring and withdrawing it, it must be admitted that in the case of Natal difficulty arose from the fact that Imperial troops were retained in South Africa and even in

Natal itself, on the services of which the Government of Natal could have relied in the event of the revolt such as it was becoming too serious for their forces to hold in check. It was this circumstance which confused the issue of martial law in Natal, and it was this fact which gave just ground for some of the objections taken to the attitude of the Imperial Government in the matter, though the objectors seldom succeeded in expressing their objections in the correct form. Responsible government involves as an essential corollary that the Government shall undertake the full responsibility for the defence of internal order: if it is not able to do this the grant of such government is clearly an error, for it means that the community is unfit for self-government. In Natal candour must admit that the grant was premature, that it was not actually desired by any very great majority of the people of the Colony as represented in the Legislature, and that the number and resources of the white population were so small in comparison with the number of natives, many of them uncivilized, that the entrusting to the Colony of responsible government was ill advised, especially when it was known that the Colony could not provide for its own internal order for some years at least after self-government. The evidence of the Natal Native Affairs Commission[1] was emphatic on the demerits of the native administration in Natal, and as it was composed of distinguished representatives of the people of Natal it is impossible to question the justice of the views so expressed. A wiser policy would doubtless have been followed had the people had before them the necessity of proving their capacity to govern themselves by maintaining security in the territories of the Colony by means of their own forces. As it was, reliance on the Imperial troops removed the necessity for caution which otherwise must have tempered and guided into better channels native policy. From the Imperial point of view the retention of troops long after the grant of self-government was occasioned in the first instance by the events of the Boer War, which prevented the carrying

[1] See *Parl. Pap.*, Cd. 3889.

out of the original intention to withdraw the forces after six years' notice from the grant of responsible government, and it was afterwards found difficult to remove them, partly in view of the recent conquest of the republics and the necessity of maintaining a garrison in South Africa to prevent any possible insurrection, a precaution obvious in itself and fully justified by the revelations made in 1914 of the irreconcilable attitude of considerable sections of the Boer population. But their presence in Natal undoubtedly led the Imperial Government into the position of aiding, however passively, the Natal Government in a proclamation of martial law which neither the Governor nor the Imperial Government could believe to be necessary.

The same accident of the presence of Imperial troops in the Transvaal led to two further incidents in which these troops were employed by local Governments in support of the enforcement of declarations of martial law, issued by those Governments. In 1907 a strike on the Rand mines necessitated the issue of a proclamation of martial law and the calling out of 1,419 of the Imperial forces as a precautionary measure, but the magnitude of the occasion was far surpassed by the strike which came to a head on July 4 and 5, 1913.[1] The number of Imperial troops employed reached the high figure of 2,910 out of a total of 6,660 then in the whole of the Union, and the loss of life in the repression of disorder in Johannesburg when the Imperial troops after sh g the greatest forbearance were compelled to fire on the rioters amounted to twenty-one lives. The Government of the Union explained the request which they made urgently for the assistance of the Imperial forces by the peculiar position in which they were placed by reason of the disbandment of the existing military forces of South Africa in order to reconstitute the Defence forces under the terms of the Defence Act. The strikers had chosen the moment for action when the Government was most helpless, and immediate measures were necessary to protect the sixty odd gold mines, the coal mines and power stations, the

[1] See *Parl. Pap.*, Cd. 6941, 6942.

municipal buildings and the stations and railways, which were manifestly in great danger. The existing forces of police, though augmented to the utmost possible extent, were quite inadequate to repress the disorder, and the presence of 170,000 male natives in the mines added enormously to the danger, since if the railway was cut there would be no food for these men in three days and rioting amongst them would be inevitable. Stress was also laid on the number of the criminal class in Johannesburg which would have taken part in any disorder and added to the confusion. The Governor-General, therefore, was satisfied that the Imperial forces must be used for this purpose despite the fact that they were not intended for any such work, and approved the action of the General Officer commanding these troops in putting them at the disposal of the civil authorities on the application of General Smuts and in anticipation of the approval of the Governor-General. The action thus taken by the Governor-General was also *ex post facto* considered proper by the two judges of the Supreme Court of South Africa who formed the Witwatersrand Disturbances Commission,[1] and who held after a prolonged investigation into all the circumstances that, had the Imperial forces not been on the spot to render prompt assistance, the injury to life and property would have been much greater than it actually was. On the other hand, it was strongly felt by the representatives of labour in the Transvaal that the Government of the day had taken unfair advantage of the presence of the Imperial troops to deny them the concessions which could have averted the strike, and Lord Gladstone, while thinking that the employment of the Imperial forces in the circumstances was essential, and that to have allowed them to stand by would have deserved the severest condemnation, laid stress on the fact that it was his intention to draw the notice of ministers to the lessons of the strike, adding that he was sure that they realized that Imperial troops were not retained in South Africa to do such work.

The warning thus given by Lord Gladstone had due

[1] See *Parl. Pap.*, Cd. 7112.

effect: the Government proceeded energetically with the reconstruction of the military forces of the Transvaal, and when in January 1914 the Labour Party brought on the general strike which they had planned as the most effective means of securing from the Government their legitimate aims, they found themselves confronted with a declaration of martial law in parts of the Transvaal, Natal, and the Orange Free State, and with the most complete preparations to suppress any disorder by means of the defence force, now fully organized and armed, and disposed with much military ability by the Government.[1] The result of the action thus taken was decisive: faced with the impossibility of achieving success the motion collapsed, and the strikers suffered complete and ignominious defeat but without loss of blood. This very fact was naturally made the ground for the criticism of the action of the Governor-General in agreeing to the proclamation of martial law when the forces mustered were obviously adequate to meet the situation, but Lord Gladstone pleaded that, apart from the fact that the Ministry were most anxious to make the repression a complete success and to avoid the use of Imperial troops by the taking of measures of the most determined type, the matter was one for South Africa to decide and not for any other authority to deal with. It is impossible to resist the force of his reasoning: a self-governing community must be allowed to manage its own internal affairs, and the Ministry must have the power to advise the proclamation of martial law without the Governor having any right to do more than interpose the reasoned suggestion which it is always within the province of a Governor to offer on any action of his ministers. But this is only possible if the Governor is not subject to any legal liability for his action, and if the Ministry do not require the support, active or passive, of the Imperial forces. As the mere presence of such forces always implies the possibility of their use, it is clear that full responsible government is impossible unless a Dominion has within its borders no military forces which

[1] See *Parl. Pap.*, Cd. 7213, 7348.

are not raised and maintained by itself. This fact explains the slow and unsatisfactory development of responsible government in the Union of South Africa. The necessities of the native territories have always, prior to the European War, rendered it necessary for Imperial troops to be quartered in the Union, and the position of the Governor of the Cape of Good Hope prior to the Boer War, of the Governor of the Transvaal after that war, but before union, and now of the Governor-General of the Union as at the same time High Commissioner for South Africa with special Imperial duties in that capacity, has really been incompatible with the natural exercise of the duties of responsible government. The difficulties of the position have as a rule been minimized by the exercise of tact on both sides; the Ministry have striven to remember that the Governor is also something more than a Governor, and he has conformed his action to the fundamental idea at the basis of the arrangement for the combination of the two offices in one hand, the advantage of securing that the policy of the responsible government colony and of the administration of the native territories should be carried on in close harmony. When, however, each side has pressed its rights to the furthest extent, as in the famous case of the disagreement between Sir Bartle Frere as Governor of the Cape and Mr. Molteno, the Prime Minister in 1878, the result has been friction and eventually in that instance the successful dismissal of the minister by the Governor, who succeeded in finding another Ministry to accept full responsibility for his action in the matter.[1]

The anomalies resulting from the presence of Imperial troops in a Dominion, in itself an undesirable state of affairs, should not be allowed to obscure the fundamental rule that the executive government must be responsible for the declaration and maintenance of martial law, that it should not be hampered in its action by the difficulty that the Governor has personal liability under the law, and that accordingly it is necessary in the interest of the full development of self-government that the Governor should be

[1] See *Responsible Government*, i. 289–91.

enabled to act freely on ministerial advice by being relieved from all liability to suit, a relief which would at the same time throw upon ministers alone the responsibility for dealing with the finances of the Dominion or State. The result could in part be accomplished by Dominion or State legislation, and as regards financial liability the suggestion that all responsibility might be removed from the Governor was made many years ago by a Secretary of State, though it has not been acted upon, but Imperial legislation for the same end would be desirable, and in part as regards criminal liability strictly necessary.[1]

[1] Quite apart from this question is the duty of an Imperial officer, wherever he is, to aid in preserving order and safeguarding life, as was done, for instance, in New Zealand by the commander of one of H.M. ships during the great strike there in Oct. 1913. There is then only the question of the common law, of a citizen's duty, not of the intervention of the Imperial Government. The same thing might have happened at Brisbane in 1912 had a ship then been there.

CHAPTER III

THE LIMITATION OF THE PREROGATIVE

It is now clear law that the Governor has a delegation of so much of the royal prerogative as is required for the conduct of the executive government of the Dominion or State of which he is Governor, and time and good sense have united to make it clear that this necessary delegation includes practically all the prerogatives of the Crown in the United Kingdom. Moreover in cases where there might exist doubt Dominion or State legislation has long ago disposed of the matter so as to render considerations of the extent of the prerogative a matter of merely academic interest. The old grant of the right to dispose of Crown land which remains as a relic of the past in the Letters Patent of Newfoundland of March 28, 1876, in those of New Zealand and the Australian States, might have long since disappeared from these instruments, as the disposal of Crown land is regulated in the Dominions and States and now also in Newfoundland by statutes, which render obsolete the old discussions as to the power of the Governor in respect of such lands. The prerogative of making appointments to offices, including judgeships, though still delegated is needless and of no value, since these appointments are regulated by statute,[1] though it has been suggested that the delegation serves as authority for the use of the royal name in the instruments of appointment.

There are, however, certain powers which are held not to pass without special delegation, and therefore only to be

[1] See for New Zealand Act No. 23 of 1912; for the Union, No. 29 of 1912. It has been argued that the power is one available to create a Royal Commission; *ex parte Leahy*, 4 S. R. (N.S.W.) 401, at p. 417, and it may be useful for this purpose. The prerogative power is recognized in Commonwealth Act No. 4 of 1912.

available for exercise in accordance with the express terms of the delegation. Of these the first and foremost is the right to declare war and to make peace, which is not now delegated to any Governor whatever. The forces raised in a Dominion are forces for the protection of the Dominion not for an aggressive war, and the Governor therefore does not require for the government of the Dominion the power of declaring war. Nor in the case of an indivisible empire is it possible for one part to make peace without the assent of the United Kingdom and, therefore, the Governor is not given authority to conclude a peace. Hence in the European War the measures of warlike operations undertaken by the Governments of the Commonwealth of Australia, New Zealand, and the Union of South Africa were all undertaken on the strength of the royal declaration of war as communicated to the Governors of the several Dominions by the Secretary of State for the Colonies, and the arrangements made by the officers entrusted with the conduct of hostilities by the several governments were of the nature of military conventions such as are competent to subordinate military commanders in the field, subject of course to confirmation or alteration by higher authority.[1]

It is clear that these prerogatives cannot belong to any but a completely sovereign power, and that their concession would convert the Dominions into independent entities even if they owned allegiance to the same Crown, in which case they would stand to the United Kingdom in much the same relation as Hanover stood to the United Kingdom during the period when that state was under the Crown of Britain.[2] The essence of a united Empire in any form is that for foreign affairs there can be only one voice, and these prerogatives therefore cannot be sought if the unity of the Empire is to be maintained. The same considerations apply to the prerogative of concluding treaties of political alliance or other purely political character, but with much less force to the power of concluding other kinds of treaties such as commercial treaties, and indeed international law

[1] *Parl. Pap.*, Cd. 7873 and 7972.

[2] See Part II. ch. ii.

shows us cases where such treaties can be concluded by non-sovereign states. An instance of a treaty so concluded by the Governor of a colony under a special authority from the Crown is that [1] between the Governor of the Transvaal and the Governor-General of Mozambique of 1909 regulating commercial relations and the employment of native labour from the Portuguese territories on the Rand mines, but as a normal rule it is found more convenient to adopt another mode of procedure eliminating the action of the Governor, which will be described later on.

A further consequence of the fact that a Dominion is not a sovereign state in the full sense of international law is that the Governor has no power to annex territory to the Dominion, and that he can only do so under the express authority of the Crown, whether conveyed before the annexation takes place or sometimes given by way of ratification of a *fait accompli*. The most famous case of the attempt of a Colonial Government to make an annexation independent of the royal authority is the Queensland effort to annex New Guinea, which was not ratified by the Imperial Government, but which in due course led to a minor annexation with new authority. In harmony with this rule is the fact that none of the territories occupied by the Dominion forces in the Pacific and in South-West Africa in the course of the war were annexed by the Dominion forces occupying them, military possession alone being taken in the name of the Crown.[2] Here again no extension of the prerogative is possible without impairing Imperial unity, unless the right to annex is strictly limited to lands hitherto unoccupied lying in the immediate vicinity of British territory, such as the lands north of Canada or even those south of Australia.

A further prerogative which cannot be fully conferred is that of the grant of honours. This power has always been most carefully withheld from a Governor, who is merely entrusted with the duty of investing the recipients of the honours conferred by the Crown upon deserving Dominion subjects. Indeed it is only the Governors-General who are

[1] *Parl. Pap.*, Cd. 4587.

[2] *Parl. Pap.*, Cd. 7873 and 7972.

given the right to confer the title, degree, and honour of knight bachelor upon such persons as they may be authorized to invest as Knights Grand Cross or Knights Commanders of the Order of Saint Michael and Saint George, and the grant of medals to soldiers or others on the mere authority of a Dominion Government has always been regarded as a violation of the royal prerogative. The force of the rule is obvious: the honours are not colonial honours, but they are Imperial, and their value is increased by the fact that they are not bestowed and cannot be bestowed except on the direct approval of the Sovereign himself. The honours so bestowed have a rank and distinction throughout the Empire which is of no small value as sign of Imperial solidarity. A Governor might, indeed, be authorized by the Crown to confer honours with Imperial validity, but the mere fact that they were not conferred by the Sovereign would invest them with certain inferiority. The alternative scheme that honours might be given which should be confined within the bounds of the Dominion or State can hardly be regarded as satisfactory: it is extremely doubtful whether by any stretch of law it could be held to be within the power of the Crown to confer any such power on a Governor, and it is most improbable that such honours would be valued highly even if the local legislature were to confer upon the Governor the power of conferring them, a view which is hardly within the bounds of possibility.

Assuming, however, that titles and honours must be conferred as the personal gift of the sovereign, the question does arise whether any change is possible in the manner in which they are at present conferred. The conferring of honours is one of the most difficult and invidious tasks which devolve upon the Secretary of State for the Colonies and the Prime Minister, and there is no Dominion in which trouble has not resulted from the mode of action. The apportionment of honours among the Canadian ministers on federation created much heartburning until it was found possible by the grant of a baronetcy to sooth the indignation

of Sir George Cartier at the higher position assigned to Sir John Macdonald,[1] and in more recent times the conferring on Sir Joseph Ward of a baronetcy in 1911 was followed by the introduction into the New Parliament of a Bill which purported to forbid the use in the Dominion of any title of honour, the truth being merely that the Opposition were dissatisfied at the conferring of so high a distinction on the leader of a government then tottering to its fall. Much more important than this episode must be reckoned the discussion which took place in the Dominion Parliament on February 5, 1913, when the second reading of a Bill to abolish titles of honour in Canada was moved in the House of Commons by Mr. Burnham. He argued that titles of honour which in their origin were indicative of office or occupation had been appropriated for ornamental purposes and had developed into names for the establishment of classes. The use of such names in a democracy was a contradiction in terms, and entirely contrary to the wish and spirit of democracy.[2] It was true that titles had been conferred on men like Sir Wilfrid Laurier, who was worthy of any title, but that fact did not make the conferring of titles any less a violation of the principle nor did it make it less likely for the democracy to incur the grave and serious danger of drifting into a possible sale and purchase of honours such as was alleged to have taken place in England. In reply Mr. Foster pointed out on behalf of the Government that the reference in the Bill to titles of honour heretofore created by the Parliament or Government of Canada had no application, as none had been created by the Canadian Government. The bestowal of honours came from the source of all honours, the King, who must be allowed to be his own judge as to the selection of persons upon whom honours should be bestowed. From that point of view there was objection to the passage by Parliament of such a Bill. Moreover he did not think that

[1] See Sir C. Tupper, *Recollections of Sixty Years*, p. 62.

[2] Cf. *Canadian Annual Review*, 1913, p. 297, for the view of the grain growers of Canada.

it was undesirable to have in a country some means of giving recognition to deeds for the benefit of the country performed in a patriotic spirit. Much of the best public service in the Empire was done without payment, and he did not think it took away from the merit of what was done that there should be a superior power which when there arose a striking case of public service could signalize it by the grant of an appropriate honour. The principle had done much good in the past and might do more in the future. Sir Wilfrid Laurier, on behalf of the Opposition, was also unable to support the Bill, though he admitted that he was much disposed to agree with the mover. He did not think that the mode of procedure by means of a Bill was proper, and considered that the appropriate procedure was a recommendation or address to the King and not an Act of Parliament. He agreed that titles both in Canada and in the mother country were a relic of feudal society: his own title was the relic of such a state, and he did not think that in Canada such titles were in accord with the spirit of the age or could ever take root. But at the same time the prerogative of the Crown had been exercised for so many centuries with such general acceptance that it was hardly possible to take very serious exception to the manner in which the prerogative had been exercised.

At the same time, in reply to questions addressed to him, Sir Wilfrid Laurier defined the position of the Prime Minister of Canada as regards the responsibility for the grant of honours. When he held that office he had regarded that matter as a prerogative of the Crown and not a matter to be covered by ministerial responsibility. The Governor for the time being should consult the Prime Minister, and the Prime Minister would mention the matter to his colleagues, but he did not consider it a matter of such importance that ministerial responsibility should be required. Even in England, while the Sovereign would generally consult the Prime Minister, there might be cases in which he would exercise his own prerogative, and he doubted if any Prime Minister would make it a matter of ministerial responsibility

or ministerial crisis. This fact was evidence that titles had become antiquated, but at the same time the experience of France, where the Legion of Honour was more sought after than it had ever been under the Napoleonic régime, proved that even in a democracy there was always present a tendency to confer such honours and distinctions.

In view of the agreement between the leader of the Opposition and the view of the Government the Bill was not pressed by its supporters and was negatived without a division.

Sir Wilfrid Laurier's statement of the relation of the Ministry to the Governor is capable of some exp nsion. The conferring of any honour is made on the recommendation of the Secretary of State for the Colonies or of the Prime Minister, according as the honour is one connected with the Order of Saint Michael and Saint George or is of a different character, though of course in the latter case the Prime Minister acts on the advice of the Secretary of State : knighthoods for Dominion services are conferred on the advice of the Secretary of State after consultation with the Prime Minister. The ministerial responsibility for appointments therefore rests with the Imperial Government, and not with any Dominion Government, and it is open for the King to confer an honour on his own initiative, though no doubt in such a case when a Dominion subject was concerned he would consult the responsible minister for the Colonies. But in making the recommendations of honours to the Sovereign the Secretary of State must act on advice for the most part since, save in the case of Governors and a few of the more prominent statesmen of the Dominions, he cannot be in a position to decide on whom honours would most properly be bestowed. Therefore it is necessary for him to have recourse to the Governor and the Ministry for guidance. The Governor in making recommendations is not compelled to restrict himself to the names submitted by his ministers : he is at liberty to submit others, his special care being to bear in mind the merit of public service, other than political, and the claims

of art, science, and literature, but he is required to inform his Ministry of the names proposed to be submitted, so that they may take any exception which they think fit. In their turn the ministers are at liberty to suggest any names whatever, and these the Governor must forward with such observations as he sees fit : it is understood that no honours will be conferred on political opponents of the Ministry without their sanction : thus when it was desired to recognize the great services of Sir Charles Tupper to Canada the full assent and approval of Sir Wilfrid Laurier were obtained and communicated to the recipient of the Privy Councillorship then awarded.[1] Nor is it normal to award any honour to a public servant of a Dominion save with the express approval of the Ministry.

The situation in the Commonwealth of Australia is, however, complicated by the existence of a federal government side by side with the State governments and not, as in Canada, in marked preponderance over the provincial governments. In that case, while the same rules apply as in the other Dominions, there is laid down the further principle that with a view to attempting to balance the claims of the different States of the Commonwealth the Governors of the States are required to send to the Governor-General copies of the dispatches forwarding their recommendations to the Secretary of State. These recommendations may then be commented on by the Governor-General to the Secretary of State, his duty being to assist the Secretary of State in the apportionment among the various persons recommended of the available honours, which naturally fall short of the numbers of names put forward. The position is clearly far from ideal, since the Governor-General has his own recommendations and those of his ministers to consider, though the latter duty is somewhat diminished by the objections to putting forward any names for honours entertained by the Labour Government when in office, and he cannot be expected to be able to regard the recommendations of the States with quite the same

[1] *Recollections of Sixty Years*, p. 12.

favour as those made by himself on his own personal knowledge or on the recommendation of his responsible advisers. It is not wonderful, therefore, that the State Governments from time to time formally raise objections to the system by which the Governor-General has any voice in the matter at all. The situation has also been rendered more difficult by the complication which arises from the possibility that a State official may be rewarded for a Commonwealth service, and further trouble has arisen owing to the rule that the Governor-General offers to invest any recipients of honours who desire to receive investiture from him, thus interfering in some degree with what the State Governors feel is their proper function. Moreover the Governor-General alone receives a delegation of the power to confer the title of Knight Bachelor on the recipients of the honour of K.C.M.G. or G.C.M.G. These matters are indeed trifles, but that does not prevent them being sources of annoyance out of all proportion to their intrinsic merit.

As the honours are Imperial and as they rest on the personal bestowal of the Sovereign, the only change which could be made in the mode of procedure would be to eliminate the personal activity of the Governor and to lay it down that no honour should ever be bestowed but on the recommendation of the Ministry. This change would in effect be very slight, the number of recommendations made by the Governors being very small, and practically no such recommendation would ever be accepted had it not received the approval of the Ministry, when suggested to them. Erroneous views as to the action of the Secretary of State in this regard have now and then been expressed, as in the case of a coronation honour bestowed on a Canadian gentleman engaged in finance, whose appointment was strongly criticized in the Canadian press: in fact, however, the gentleman in question was recommended not for Canadian services but for his services as an M.P. in the United Kingdom by the leader of the Opposition, and the honour was conferred on that ground alone without reference to the Secretary of State for the Colonies. The issue, therefore,

narrows itself to the questions whether every recommendation made by a Dominion Government is to be adopted, and put in that form the answer must clearly be in the negative, since, as the honour is an Imperial one and as the number of honours to be bestowed must be limited, only a selection of the names put forward can possibly be accepted. In making his choice the Secretary of State naturally welcomes the opinions of Governors as to the comparative merit of the various candidates put forward by the Ministry, but it must be remembered that the recommendation of the ministers is submitted in full to the Secretary of State, and that therefore, the opinion of the Governor is merely one of the facts which the Secretary of State has to take into account. It is doubtful, therefore, whether any substantial change in the present procedure is either necessary or desirable. The simple plan of abolishing honours for Colonial services is one which has not yet by any means won general approval in the self-governing Dominions, nor at present is there any indication of the trend of public opinion in these Dominions decisively in that direction.

At the same time it is right to say that the conferring of hereditary honours in the case of residents in the self-governing Dominions is probably a mistake. It is not a practice of recent origin: baronetcies have been bestowed from a comparatively early date upon men in respect of Dominion services, nor can it be forgotten that a considerable number of baronets in the United Kingdom claim to be baronets of Nova Scotia. Peerages have been fewer: Sir John Macdonald's services to Canada were recognized by the conferring of one on his widow, and Lords Mount Stephen and Strathcona obtained their peerages, in each case with a special limitation, for financial services to the Dominion. But in all these cases the recipient was resident in the United Kingdom, and though the suggestion that peerages might properly be bestowed for services in Australia has been put forward occasionally in the Australian press, it would be idle to deny that such a proposal would not meet with general approval. The conferring of a baronetcy

on Sir Joseph W[illegible] was certainly unpopular among quite a wide circle in New Zealand, and has told against his well-deserved popularity in that Dominion: in the opinion of competent observers it assisted in his defeat in the general election of 1911. In South Africa the feeling does not seem to be so marked, but South Africa is not a pure democracy, and its views cannot be deemed to be precisely those of the great democratic communities generally. If as early as the end of the eighteenth century it was felt that the proposal to create a hereditary aristocracy which was contemplated as possible by the Quebec Act of 1791 was out of the question [illegible]ation of a mere social aristocracy must be deemed [illegible] with the ideals of the Dominions in the [illegible]ury. The grant of membership of the various orders of knighthoods, of the highest distinction of Privy Councillorships terminate with life, and are earned by service: there is no essential objection on democratic grounds to such distinctions which meet a need of human nature, but there is the gravest objection to the grant of honours which descend to those who have no claim to them except by the accident of birth.

The grant of such honours is made the more objectionable by the curious and indefensible anomaly laid down in No. 142 of the Colonial Regulations, which in the last edition reads as follows:

> Except as provided in the following paragraph, British subjects who enjoy in the United Kingdom precedence by right of birth or by dignity conferred by the Crown do not lose such precedence, while either temporarily or permanently residing in any part of His Majesty's over-sea dominions.
>
> In the absence of special instructions from the King, and subject to any specific provision in the authorized local tables, the precedence within any of the Governments of His Majesty's over-sea dominions of all persons holding office or discharging official duties, whether naval, military, or civil, within that Government, is determined solely by official rank, and the wives of such persons, even though they enjoy precedence in the United Kingdom by right of birth, take their place according to the precedence of their husbands.

The second paragraph above cited lessens the absurdity which would result from the strict application of the rule as first enunciated, under which in not a few instances subordinate officers would have taken precedence over the ministers in charge of the departments of State in which they were serving at the time. But the rule as a whole must be deemed to be wholly incompatible with the principles of responsible government which demand that precedence should be regulated by the Governor solely in accordance with the wishes of ministers as regards every person residing in or visiting the Dominion, subject of course to any wishes of the King regarding the precedence of the members of the royal family, who normally rank immediately after the Governor, though on special occasions, such as the visit of the Duke of Connaught to the Union of South Africa to open the first Parliament of the Union, special precedence over all persons in the Dominion, including the Governor-General, was granted by Letters Patent. Subject to this one exception there is no possible ground of Imperial interest in insisting that persons entitled to precedence in the United Kingdom shall enjoy such precedence in the self-governing Dominions, and the rule as laid down in the Colonial Regulations contradicts other instruments of greater validity such as the authorized table of precedence for the Commonwealth of Australia which does not conform to the rule. Nor in point of fact is the rule strictly observed: indeed save at the most formal functions, such as birthday dinners, precedence is normally not strictly observed in governmental functions in the oversea Dominions. In the Commonwealth of Australia indeed the question is as usual complicated by the existence of the States and the Commonwealth as in some degree equal authorities. The Commonwealth table assigns in the opinion of the States too low a position at Commonwealth functions to State ministers, and the States have State tables of precedence which differ among themselves and differ from the tables for the Commonwealth in the position assigned to the several officers. In Victoria and Tasmania

special precedence is conferred by law on the Chief Justices, and this precedence can only be modified by legislation. A further confusion arises from the question whether the presence as a guest of the Governor-General turns a function into a Commonwealth function, though the answer to that question would appear to be clearly in the negative, and the height of confusion is reached in theory though not in practice by the occasional holding of joint levées by the Governor-General and Governor of a State.

The question of ecclesiastical precedence, long agitated, has practically been solved by the recognition of the severance of the Church of England in the Dominions from any direct connexion with the State, and the natural conclusion that ecclesiastical precedence must be honorary and need not be confined to any one denomination, a position which leaves the Governor to settle the matter with the aid of ministers in such manner as meets from time to time the needs of the community, even if it does not necessarily satisfy wholly the views of the heads of the different Churches. The question, like all questions of precedence, is essentially one which does not lend itself to rigid definition, and the compiling of a table of precedence for the Dominions is a task which promises less and less success. The old Canadian table which is nominally still in force contains a good many anomalies and even absurdities, but any alteration would raise thorny questions of the kind indicated in a debate in the Canadian Parliament in 1909 when a proposal was made that the quasi-diplomatic position which the Consuls-General of the great powers were coming to occupy in the Dominion should be recognized by the assigning to them of a definite place in the table of precedence. The proposal was not without some weight, and the Government were not at all unsympathetic in tone in their reply, but it was not felt desirable to take any action, nor indeed could a new table of precedence be drawn up without raising grave questions connected with ecclesiastical precedence. The obvious conclusion to be drawn is that precedence is essentially a matter for the judgement

of ministers and for the fullest exercise of the rules of responsible government.

A further prerogative, the complete exercise of which is not entrusted to a Governor, is that of mercy, which is still dealt with as in some degree a matter too important to be completely entrusted to the Governor for exercise at the discretion of his ministers. The reservation of authority is a historical accident easily explained when it is remembered that responsible government began at a time when the Colonies were far from the mother country as regards means of communication, and when the communities were so small that the prerogative of mercy was one to be exercised with great care under difficult circumstances. It was also for a long time considered by ministers to be in their own interest to maintain the responsibility of the Governor: they were, in cases in which they were unwilling that the prerogative should be exercised, able to state that they had no power to comply with the requests made for the liberation of criminals, and that the matter was one for the discretion of the Governor. But naturally with growing sense of self-reliance ministers began to feel that they were entitled to have a say in all matters connected with the management of the affairs of the Colony, and in 1888, as a result of an insistence by the Governor of Queensland on the strict[1] interpretation of his rights under the instruments of Government, the Ministry resigned office, and the Secretary of State for the Colonies found it impossible for him to support the position taken up by the Governor. In 1892, as the result of a communication from the Governor of New Zealand, who pointed out the anomaly of a position in which the Governor was instructed to exercise a personal discretion which he could not effectively do in face of the power of ministers to resign and render his position untenable, the personal responsibility of the Governor in the Australasian

[1] Perhaps an erroneous one, as the question actually raised was one affecting a statutory power under the *Probation of Offenders Act* to reduce sentences. But the principle was discussed as such; cf. Queensland *Votes and Proceedings*, 1888, i. 601–5.

Colonies was restricted, as it had already been restricted in Canada since 1878, to cases in which the grant of a pardon or reprieve might directly affect the interest of the Empire or of any country or place beyond the jurisdiction of the Government of the Dominion, in which cases the Governor was to take these interests into his own personal consideration in conjunction with the advice tendered to him by his ministers. This is now the position in the case of Canada, the Commonwealth of Australia, the six Australian States, and New Zealand, but there are still further restrictions imposed in the case of the Union of South Africa and of Newfoundland. In the former case the Governor-General is required, whenever any offender shall be condemned to death by the sentence of any court, to submit to the Executive Council any report made by the judge who tried the case, and to consult them with regard to it, taking steps to obtain the presence of the judge if that course is deemed desirable. The Governor-General shall not pardon or reprieve the offender unless it shall appear to him expedient to do so upon receiving the advice of the Executive Council thereon : but in all such cases he is to decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgement, whether the members of the Executive Council concur therein or otherwise ; but in case he decides any such question in opposition to the judgement of the majority of the members of the Council he shall enter on the minutes of the Executive Council a statement of his reasons for not acting on the advice of that body. In other than capital cases he is, like all other Governors, except that of Newfoundland, expressly required to receive the advice of one at least of his ministers, who would of course be the minister for justice or officer corresponding, and in such cases nothing is said as to his forming a personal opinion in cases where Imperial interests are concerned. In the case of Newfoundland, which adheres to the old type, the Letters Patent and Instructions dating from 1876 before the changes in the Canadian instructions were made at the request of the Canadian Government, no obligation of consulting ministers

is expressly inserted, but in capital cases the Governor is required to follow the procedure sketched above in the case of the Union. The result in the Colony has been not altogether satisfactory, since until quite lately the Ministry have left the Governor to deal with all cases of pardon, with the inevitable result that when Sir William Macgregor pardoned an offender for a slight contravention of the game laws, he was somewhat bitterly attacked in the Opposition press, nor does it seem that in the time of his successor[1] matters had altered in any way for the better, though it is now recognized that theoretically at least Governors are not responsible for dealing with cases of applications for remissions of sentence, save in capital cases. It is, however, easy enough to understand how serious is the pressure put upon ministers in countries with a small population when death sentences are involved: in Tasmania, on the last occasion of such a sentence, the Governor took pains to point out that the responsibility, no Imperial interest arising, lay on his ministers, not on himself, and the Ministry, despite the fact that the murder was a particularly inexcusable one, felt bound to yield to popular feeling and commute the sentence of death. Somewhat later in Western Australia the Government were attacked bitterly in Parliament by one of their own supporters for their determination to carry through a death sentence, the justice of which could only be denied by supporters of the abolition of capital punishment for every offence. In New South Wales still more recently the action of the Government in commuting the sentence of the perpetrator of a particularly cold-blooded murder was challenged in Parliament and attributed to the lack of moral courage of the Government, an attack to which the most effective reply of the Government was that their opponents had shown equal lack of moral courage.[2] In Canada successive Governments have had energetically to assert the principle that the action of ministers in granting

[1] See Sir R. Williams, *How I became a Governor*, p. 415.

[2] New South Wales *Parl. Deb.*, 1910, Sess. 2, pp. 44 seq. Cf. ibid. 1911, pp. 1295, 1296, 1316; *Sydney Bulletin*, July 13, 1911; Aug. 10, 1911.

pardons must not be made the subject of parliamentary discussion if the evil of dealing with judicial matters by the worst possible of tribunals, a deliberative assembly acting on *ex parte* statements and arguments, is to be avoided, and the tenor of justice not obstructed. The strength of popular feeling can be seen from the famous incident in the Union of South Africa, when the Governor-General in his Imperial capacity as High Commissioner commuted a sentence of death passed for an offence committed by a native in Southern Rhodesia, although of course Lord Gladstone's action as High Commissioner was not in the slightest degree a legitimate source of complaint by the people of the Union, to whom he owed no duty or responsibility in the matter.

But, though these instances might easily be increased *ad nauseam*, it does not appear that any proper purpose is served by the attempt to create an independent position in these matters for the Governor or to throw upon him a personal responsibility. It may be convenient for ministers to shelter themselves behind that responsibility, but that is no reason for sparing them the burden of a duty which is an essential part of the Government of any country. The retention of a clause requiring the personal responsibility of a Governor for the execution of death sentences cannot possibly be justified when the question is merely one of internal administration: the concession of responsible government should not be made to a community which cannot be trusted to deal properly with its criminals. If the question is one of Imperial concern, it is equally clear that the decision should rest with the Dominion Government, upon whom the Governor on his own account and on the account of the Imperial Government can urge whatever considerations may be of importance in the matter, and it really cannot be assumed that any Dominion Government would fail to give due effect to these recommendations on behalf of a criminal. At least it would be wholly impossible to find any case recorded in which the Government of any Dominion or State has refused just consideration to

such a claim, or any case in which the Governor has really required to overrule his ministers on such a head. Any cases in which representations on behalf of a criminal have been made by foreign Governments of which there are several on record, the best known being the case of Andersen in South Australia, have been examined by the Colonial Ministries and any necessary action taken in respect of the examination. The restriction in the case of the Union of South Africa and Newfoundland might be said to have a certain justification arising from the special facts of these cases, but it may be doubted if it is really worth while endeavouring in this very indirect way to secure protection for natives in the Union in the solitary case of death sentences, and in Newfoundland the only Imperial use of the prerogative could be to protect aliens in the enjoyment of fishery rights from penalties imposed under local laws, and it may safely be assumed that the Governments of these aliens would take effective steps to relieve directly or indirectly these alien subjects from any wrongful penalties imposed upon them, though no doubt the remission by the Governor of such penalties might be a more convenient mode of procedure from the point of view of the Imperial Government. But any real issue of this kind should be met by direct action such as was taken in 1907, when for a definite purpose the laws of Newfoundland regarding the fishery were overridden by Order in Council[1] in order to preserve American fishery rights, and when the simpler means of the use of the prerogative of pardon was not resorted to, nor contemplated.

A further criticism on the existing rule as to pardon presents itself. In every case it is expressly laid down that the Governor is not to grant pardons conditional on the person pardoned going into banishment or exile, though except in the case of Newfoundland this rule is not applicable to cases of a political offence unaccompanied by any other grave crime, and in the case of the Union of South Africa, in view of the extreme fondness of criminals for infesting

[1] See *Parl. Pap.*, Cd. 3765.

the Rand, the prohibition of banishment is restricted to the case of British born or naturalized subjects. The origin of the limitation is historical: the United States Government complained in the case of one Gardiner that he had been liberated by the Governor of New South Wales on condition that he went into banishment, and protested that this procedure was improper as tending to induce criminals to have resort to the United States, and the principle was then adopted that each Colony should accept responsibility for the punishment of its own criminals.[1] The principle is on the whole a just and proper one, at least when it is limited to British subjects, as there may well be cases where the best plan of dealing with a criminal alien is to expel him for good from the scene of his misdeeds, but it is not a principle which should be enforced through the Governor in the mode prescribed. It could not of course effectively be thus enforced. There is nothing whatever to prevent the making of an agreement between the criminal and the Administration that if he is willing to leave the State he will be permitted to do so, but will be prosecuted if he again appears in it, so that banishment can in practice be effected.

It is clear that the best course to adopt and that most in harmony with Imperial relations is that the power to pardon should be delegated in absolute terms without any sort of reservation and subject to no conditions whatever. The taking of this step would result in the removal of the absurd anomaly through which the Governors-General of Canada and the Union of South Africa have been deprived of the power to pardon offenders who have committed crimes outside the Dominion for which they may be tried within the Dominion or Union. This anomaly is due, it is clear, to following in the instruments for Canada and the Union the terms of the Royal Instructions to the Governor-General of the Commonwealth of Australia. In the Commonwealth the criminal law remains under the control of the States, and the Governors of the States therefore possess the power of pardoning offences against the criminal law,

[1] See *Parl. Pap.*, C. 1202, 1248.

and also offences for which offenders may be tried in State courts though the offence was not committed in the Commonwealth. The power of pardon in the case of the Governor-General is therefore limited to offences against the laws of the Commonwealth, as is appropriate since the laws of the Commonwealth and the States are distinct things. In Canada and the Union, however, the Lieutenant-Governors and Administrators of the provinces have no delegation of the pardoning power from the Crown, though the former have the power to remit penalties under provincial statutes, a power conferred by statute, and accordingly the following for Canada and the Union of the Commonwealth model has resulted in an omission, which could only be made good in strict law by the exercise of the royal prerogative by the Crown or by a special delegation. Moreover, by the same procedure the powers of the Governor-General of Canada, as it existed under the Letters Patent and Instructions up to 1905, to pardon for offences against the laws of the provinces is taken away and no power of pardon in the case of offences against the provincial Acts of the Union is conferred on the Governor-General, omissions of theoretic interest if of no practical importance, since apart from the question whether such pardons are ever likely to be desirable, no one would question a pardon, even if not lawfully granted, by the Governor-General.

A further power hitherto delegated to the Governor has recently become of doubtful validity. Early in the history of New Zealand it became obvious that it was often desirable that when the Governor was on duty in some part of the Colony at a distance from head-quarters, as was naturally often the case, there should be some person within easy reach available to perform the minor operations of government which required his assent. It was therefore decided that it would be desirable by express provision to alter the rule that a delegate cannot delegate his powers, and provision was accordingly made in the Letters Patent of 1867 which permitted the Governor, in the event of his having occasion to be absent for a short period from the Colony or the seat of government, to appoint by an instrument

under the public seal the Lieutenant-Governor of the Colony, or any other person if no such officer existed, to be his deputy and to exercise on his behalf during his absence such powers and authorities vested in the Governor by the Letters Patent as should be specified in the instrument, without prejudice, however, to the full exercise by the Governor of his powers. The same rule was adopted in the case of the Australian Colonies, and the convenience of the practice is obvious. Provision is also contained for the appointment of deputies by the Governors-General of Canada, the Commonwealth, and the Union of South Africa in the constitutions of these Dominions, the power being given by statute for the same reason as the creation by statute of the office of Governor-General, the Crown having no prerogative to create the federations or appoint their officials.

In 1906, however, a Bill was introduced into the House of Assembly of South Australia and duly passed by that House under which it was contemplated to confer on the deputy Governor all the statutory powers of the Governor and the powers conferred on the Governor by the Letters Patent. The Bill was rejected by the Upper House, which considered not unnaturally that, the matter affecting the prerogative, it was neither necessary nor desirable, but in 1910 it was reintroduced and passed in an altered form, and was reserved for the signification of the royal pleasure. It appears from the preamble and the proceedings in the Parliament on the Bill that it was felt by the Chief Justice of the State to be doubtful whether the Letters Patent were adequate to delegate to the deputy Governor any powers other than those portions of the prerogative which were actually possessed by the Governor by reason of their delegation in the Letters Patent only, and whether anything short of a statute would be adequate to enable the Governor to delegate powers which were vested in him by statute only. The Bill therefore delegated to the Governor the power to appoint a deputy during his temporary absence from the State or from the seat of government who would be able, subject to any limitations contained in the instru-

ment appointing him to be a delegate, to perform any of the prerogative powers or statutory powers of the Governor. It conferred the same power on the officer for the time being administering the government and *ex majore cautela* it ratified all acts done by deputy Governors in the past.

The essence of the argument plainly is that the term Governor in local acts refers only, unless the contrary is clearly expressed, to the person actually appointed by the Crown to be Governor, and does not apply to a deputy whom that person may be definitely permitted by the Crown to appoint to exercise a certain portion of his functions. The question is one doubtless not free from ambiguity, but in favour of the validity of the power must be set the fact that save by Sir Samuel Way in South Australia no doubt seems ever to have been expressed by the law officers or judges of Australia or New Zealand as to the right of the Crown to confer this power, and that it is difficult to see, in the absence of any statutory definition of the term Governor, how it is not open to the Crown to arrange for the action as Governor of a defined individual selected by the Governor. At any rate although the Act was accorded the royal assent by Order in Council, thus intimating the acceptance by the Secretary of State of the views of the Chief Justice, and although the attention of the other States and of New Zealand was drawn to the passing of the Act, the opinion of its necessity was not by any means unanimous. New Zealand [1] indeed legislated by Act No. 4 of 1912 in the sense of the South Australian Act, and Tasmania followed suit by Act No. 18 of the same year, but no legislation seems to have been deemed necessary by the high legal authorities of New South Wales [2] and Victoria, and the need for such legislation may very well be doubted in the case of a prerogative exercised for some fifty years without question raised.

[1] See *Parl. Deb.*, clviii. 530 2. So in Western Australia by Act No. 17 of 1911; *Parl. Pap.*, Cd. 6091, p. 54.

[2] Cf. *Clough* v. *Bath*, 22 W. N. (N.S.W.) 152, where a signature of the Chief Justice acting as Deputy was held valid though not stated to be signed by him as deputy.

CHAPTER IV

IMPERIAL INTERVENTION IN EXECUTIVE ACTS

THE Governor of a Crown Colony is in constant receipt of instructions for his guidance from the Secretary of State, and in his executive action he is always subject to control from home. The essence of responsible government is to transfer the direction from the Imperial Government to the Government of the Dominion or State, but the question inevitably presents itself whether that transfer is absolute, or whether there is any class of cases in which a Governor should or may act in disregard of the wishes of the Ministry of the day, on no other ground than that he is instructed or holds that an Imperial interest is involved in the matter, which it is his duty to preserve even at the expense of disagreement with ministers. It is clear that in so far as such a class or classes of cases exist there is a definite limit to the self-government of the Dominions.

Apart from his action as part of the Legislature, which will concern us later,[1] two classes of cases have already[2] been mentioned. In the first place, the Governor has certain definite obligations in the case of the exercise of the prerogative of mercy, and in the second place, he is not bound to support the recommendations for honours put forward by his ministers or to refrain from putting forward names of persons whom they do not recommend. These are definite departures from the full rule of responsible government; the former is an anomaly which might well be removed, but the latter is less easy to dispose of, as it is essentially a case in which Imperial and Dominion interests are so involved as to exclude the full operation of the rule of responsible government, inasmuch as the principle in this event comes into conflict with the principle that the Crown has a right to confer honours without ministerial responsi-

[1] Part II, chap. i. [2] Above, chap. iii.

bility and that for the conferment of honours not made *proprio motu* by the Crown the Imperial Government has a responsibility to the Imperial Parliament.

The state of affairs as regards honours suggests that any other instance in which the Imperial Government has interfered or sought to interfere in connexion with the executive acts of a Dominion Government will lie in a debatable region in which Imperial and Dominion action are seriously confused. In point of fact this is precisely the case in the most famous of modern instances, the instruction sent by Lord Elgin as Secretary of State on March 28, 1906, to the Governor of Natal to suspend the execution of twelve natives who had been tried by a court-martial sitting under martial law, proclaimed on February 9, for the murder of two police officers who had fallen on February 8 in the execution of their duty in the arrest of certain natives.[1] The unrest in the Colony was apparently in some degree consequent upon the removal of the forces of the Imperial Government from Natal, with the exception of the remnants of the garrison regiment which was then in the process of gradual disappearance, the policy under which it had been created having been abandoned by the Imperial Government. The result of the withdrawal, which was in strict accordance with the arrangements made on the concession of responsible government, though the actual move was delayed owing to the outbreak of the Boer War, was doubtless to impress the Government of Natal with a sense of the danger of the position of the Colony with its white population of 100,000 to nine times that number of natives, and the murder of the policemen, which would normally have been regarded as mere matter for the action of the police force, led to the hasty declaration of martial law, and an energetic appeal to the Imperial Government was made by the Natal Government for the sending of Imperial forces from the Transvaal, on the ground that the moral effect of the sending would be incalculable though it was not expected that any actual use of the men would be made. The request was complied

[1] *Responsible Government*, i. 291–6.

with, the 2nd Cameron Highlanders being dispatched from Pretoria to Pietermaritzburg, where their mere presence at once impressed the whole native population of the Colony with the view that the Natal Government had the full support of the Imperial Government. In these circumstances it would have been normally proper that the trial of the alleged murderers of the two policemen should have been carried out by the extremely competent High Court of Natal, but the Government, despite the representations to this effect by the Governor, who naturally considered that with the situation well in hand there was no need for the action under martial law when the courts of the Colony were open, insisted on trying the natives by a court-martial. Their persistence in this action is the more remarkable in that they had clearly not the slightest desire to give the prisoners anything but a fair trial: care was taken to examine witnesses in the defence of the accused, and to treat the matter with all serious consideration, and the decision to execute twelve of the natives was only arrived at after the sentences of the court had been carefully considered by the Governor in Council. On the other hand, the proceedings could not from the nature of the case possess that validity and security of due observance of the forms of law and justice which would have resulted from the adoption of the normal mode of trial by the law courts. This fact naturally caused perturbation in the United Kingdom, and at the same time the position of the Imperial Government was directly affected by two considerations: in the first place, they could not ignore the fact that the action of the Government of Natal was in the long run rendered possible by the presence of the Imperial forces in South Africa, and immediately by the presence of the battalion in Pietermaritzburg, and in the second place, they realized that the action of the Natal Government and of the Governor must be sanctioned *ex post facto* by an Indemnity Act, since obviously as the courts were open there could be no chance of alleging successfully that the court-martial held on the murderers was legal in itself.

It was in these circumstances that the Secretary of State

on March 28, 1906, learned from the Governor that it was intended to execute twelve of the natives tried for the murder of the policemen, that the trial had been conducted in due order, that the sentences had been considered by the Governor in Council, and that the Governor had agreed, being satisfied that no injustice was being committed. Lord Elgin replied by telegram on the same day that feeling was being caused by executions under martial law, that the Imperial Government was involved through the retention of Imperial troops in the Colony and the necessity of sanctioning an Indemnity Act, and he added, 'I must impress upon you necessity of utmost caution and you should suspend executions until I have had opportunity of considering your further observations'. The reply to this telegram was an intimation through the Agent-General of the resignation of the Ministry; further information was supplied by the Governor on March 29, and on March 30 the Imperial Government agreed to the executions if the Ministry on full consideration considered them necessary, a view which the Ministry naturally held.

The episode is one which unhappily has never received the discussion in cool and calm dispatches which Mr. Churchill promised the House of Commons that it would in due course receive, and the view of the Government on the topic must be gathered from the reply made by Mr. Churchill to the criticisms of the Opposition in the debate which took place in the House of Commons on April 2 on the motion for the adjournment of the House moved by Mr. Ramsay Macdonald to discuss the way in which martial law in Natal was being applied, and the imminent and grave dangers to the native subjects of the Crown involved in its administration. The gist of this brilliant and combative defence is that by an unfortunate concatenation of circumstances the Governor failed, without any fault being imputed to him,[1] to make known the full situation as to the means taken to make clear the guilt or otherwise of the natives, so that the telegram of March 28 arrived when it had been

[1] This was clearly absurd.

assumed by Lord Elgin that the trouble was subsiding, that the information of the proposed execution came as a great surprise, that the telegram of suspension and inquiry was absolutely essential in order that the Secretary of State should be able to justify his position, that the resignation of the Natal Government had a flavour of precipitancy, but that it had not influenced in any way the decision of the Imperial Government, which would have been the same had the Government not resigned, once it had the requisite information. He made further a strong point by insisting that had the persons executed been foreigners the Imperial Government would have been the persons to whom the foreign Government would have turned for redress, and he also laid stress on the importance of the meting out of even-handed justice to the native subjects of the Crown. Colonel Seely reinforced Mr. Churchill's arguments by insisting on the error of trying the men by martial law in view of the defects of any military tribunal from the point of view of appreciation of legal points. The Opposition was feebly represented: Mr. Long was impressed with the gravity of the question at issue and much relieved by the explanation given, though he raised the question whether it was proposed to treat the great self-governing Dominions in the same fashion as Natal. Sir Gilbert Parker insisted that every Colony had a perfect right to manage her own affairs, as she thought proper; and laid stress on the fact that the Commonwealth of Australia has telegraphed to express objection to interference with the action of a self-governing Colony.

It is clear that the comparisons of the case of the great self-governing Dominions with that of Natal were hardly seriously meant as contributions to the discussion, and allowance must be made for the natural bitterness of feeling of the Opposition in view of the recent defeat of the party at the general election, which had been greatly contributed to by the policy of the late Government as to Chinese labour. The sufficient answer to that argument is that the self-governing Dominions like Canada do not require the aid of British troops to keep them from grave risk in the event

of a native rising, and that the acceptance and indeed earnest solicitation of Imperial aid is not consistent with full self-government when that aid is needed for the preservation of internal order. Nor again can it be supposed that a Ministry conscious of its true position and duty would have resigned in the midst of what it declared to be a critical situation without even arguing the question at issue with the Secretary of State; such headlong precipitancy was the action of an admittedly weak Government seeking public applause in view of an approaching parliamentary struggle, and had the Imperial Government been as little aware of its duty as the Government of Natal it could have met the situation by the withdrawal from Pietermaritzburg of the battalion, and the grant of leave of absence to the Governor, leaving Natal to emerge as it best could from its difficulties, with the immediate result of a collapse on the part of the Ministry. Fortunately, the Imperial Government was not in the slightest degree likely to take any such step, and so the Government of Natal could take its dramatic exit with safety. Nor on the main question was there the slightest justification of the trial of the natives by martial law; the Governor urged them not to adopt this course, and no unprejudiced judge can deny that he was in the right. Had the Imperial Government in the special circumstances of the case insisted on the Governor withdrawing the proclamation of martial law, a serious issue might have arisen between the Colonial Government and the Imperial Government, but the action of the Imperial Government amounted merely to a suspension of an execution pending further information, and the resignation took place without even an attempt to argue the matter.

It is right, however, to admit that the Secretary of State's telegram was in one matter defective; it conveyed to the Governor an instruction to suspend the executions, and this instruction was contrary to constitutional usage.[1] After

[1] This may seem a small point, but it appears to be valid: certainly it would have been impossible for any official of experience to draft such a telegram.

all the Governor was acting as he had expressly stated on the unanimous advice of ministers and he had declared that no injustice was being done; these were specific statements, and while the burden of responsibility on the Imperial Government in view of the employment of Imperial forces *de facto* to keep the rebellion in check was a heavy one, there was no ground on March 28 for the Secretary of State to do more than to send an invitation to ministers, through the Governor, to suspend the execution until he was supplied with such further information as might be necessary to place the Imperial Government in a secure position from the point of view of its responsibility to Parliament and the country at large, in which a good deal of feeling had been excited and in which sympathy for the natives was strong. Had such a telegram been sent, or had the Secretary of State taken the still simpler plan of telegraphing in reply that he had learned with concern of the necessity to execute the natives on trial by a court-martial, but that if the Governor were assured of their guilt he must accept his assurance, it would have been wholly impossible to criticize the action of the Government in any way. But by adopting the form of words cited above, which gave an instruction to a Governor to override a decision of ministers in which he had concurred, instead of preferring a request, the Secretary of State was guilty of an error of judgement, which a more expert Governor than Sir Henry McCallum would have perhaps been able to make good. It must be remembered in fairness to Lord Elgin and to Mr. Churchill that both were wholly without familiarity with the conventions of correspondence with self-governing Dominions, and that their decision had to be taken in a very brief space and without the full advantage of consultation with their permanent officials.

Such as it is the incident stands by itself, and the circumstances attending it are too peculiar to allow it to rank as a precedent of any value for any purpose. The conclusion has, however, been drawn by authorities who might have been expected to be better informed that the Natal case

has established the rule that a Dominion Government in any dispute with the Imperial Government has only to resign in circumstances which make it certain that the Governor cannot find any alternative Government for the Imperial Government to give way. For this view there is neither any logical ground nor any current of practice. The solitary example which can actually be cited is, as has been seen, *sui generis*, and concerned simply with an order to a Governor to act independently of ministers in an executive act under martial law. In 1892 the Governor of New Zealand refused the request of the Ministry of Mr. Ballance to add twelve members to the Upper House; the Governor acted not on instructions from the Imperial Government but on what he understood to be the line of policy laid down by that Government in favour of the maintenance of the independent character of the Upper House of Parliament. The Government of the day declined to resign, on the ground that if the Governor was acting according to his duty they could not take that as a ground for refusing him their assistance in the government, and the matter was in due course settled in their favour by the Secretary of State.[1] In 1907, the next year after the Natal incident, the Government of Newfoundland found their legislation overridden by an Imperial Order in Council made under an Act of 1819, but even the very extreme nature of this action did not result in the resignation of the Ministry.[2] In 1908 the then Government of Natal found itself at loggerheads with the Imperial Government over their stoppage of the payment of the salary of the Chief Dinizulu, whom they had arrested under the cover of martial law, proclaimed without any justification and against the opinion of the Governor and the Secretary of State; Natal had agreed not to interfere with that salary, save with the consent of the Secretary of State, at the time when Zululand was handed over to the colony to govern, and the Imperial Government insisted on their intention to pay it. The Natal Government yielded and made

[1] *Parl. Pap.*, H.C. 198, 1893–4.
[2] Ibid., Cd. 3765.

arrangements to assist the Chief in preparing his defence.[1] The Parliament of New Zealand in 1910 passed a drastic Shipping Bill intended to penalize vessels which employed orientals in their crew; the passing of the Bill was asserted in Parliament to be essential, but when the Imperial Government could not give its assent, the New Zealand Government, despite the unanimity of feeling in the Dominion, took no steps to resign. In 1906 the Parliament of the Commonwealth passed a Bill to give a preference to British goods conveyed in ships manned only by white labour and being British; the Imperial Government was unable to agree to the Bill, partly on treaty grounds, but still more because they could not accept a preference which was given in a manner to differentiate against British subjects of Indian origin.[2] Nevertheless, Mr. Deakin, least likely of men to acquiesce in any course not constitutional, remained in office. In the midst of the very lively discussions between the Imperial Government and the Canadian Government on copyright, from 1889 to 1894, though the temper of Canada ran high, resignation was never hinted at;[3] nor from 1907 to 1913 did the Commonwealth ever threaten resignation, despite the somewhat unbending attitude of the Imperial Government regarding the treatment of merchant shipping.[4] It would be easy to prolong the list of cases, but it is needless to do so; it is certain that no Government has ever resigned because of disagreement with the Imperial Government on any other subject than martial law executions in Natal

Nor is it difficult to see the reason why this is so. The Government of the United Kingdom could regard with equanimity the resignation of a Dominion Government, even if no other Government would take its place; it is not responsible for the carrying on of the Government, and all inconvenience to the Governor could be avoided by the simple process of giving him leave of absence. It is ludicrous to suppose that the Dominion would remain without

[1] *Parl. Pap.*, Cd. 3888, 3998, 4001, 4194, 4328.

[2] Ibid., Cd. 3523.

[3] Ibid., C. 7781, 7783.

[4] Ibid., Cd. 2483, 3826, 3891, 4355.

ministers and that its political life would end because there was a disagreement between the Government and the Imperial Government. The only means of bringing about a really serious state of affairs would be for the Dominion to set up as an independent state. The reason why the action of the Government in Natal made the position difficult for the Imperial Government was the simple fact that the Imperial Government, having troops in the Colony and having large and important interests throughout South Africa, could not view with equanimity disorder in Natal.

The question is of importance because it illustrates the negative side of responsible government; while that government means the greatest possible exercise of freedom of action for the Ministry, it at the same time involves the consequence that the Ministry must be guided by reason and moderation, and must be prepared to consider the rights of other governments within the Empire and to contribute its share of concession in order to reconcile conflicting interests, for the conflict of interest from time to time is quite inevitable in any group of communities.

To the rule of action on ministerial advice it has been often suggested that an exception exists in cases where the power to act is given to the Governor by Imperial statute and not by local act; in these cases it is maintained the Governor acts with the authority of an Imperial officer, and not as a Colonial officer at all. This proposition will not, however, stand consideration. In the first place the possibility of acting effectively without the advice of ministers is obviously minimal, and in the second place the only sound principle must be that for action in a Dominion there must be a minister responsible. Nor on examination will any of the statutes be found to be such as to render such personal action at all desirable. Thus certain powers were given to Governors by the Acts for the protection of aborigines in the Pacific when being recruited for work in Queensland or elsewhere in the Pacific; an attempt to claim that the Governor of New Zealand should act on his own discretion was very properly rebuked by the

Governor who pointed out that he could not act in the manner laid down except by the aid of his ministers, on whose advice he would act. Other cases are the duties of Governors under the Extradition and Fugitive Offender Acts, under the Merchant Shipping Act, under the Territorial Waters Jurisdiction Act, and minor Acts ; in each of them it will be seen on analysis that it is presupposed that the Governor acts with the full aid of a colonial administration, which is as much as to say that he acts on the advice of his ministers.

CHAPTER V

THE DISSOLUTION OF PARLIAMENT AND THE DISMISSAL OF MINISTERS

1. The Dissolution of Parliament

In the cases hitherto discussed the apparent exceptions to the rule that a Governor, like the King, acts on ministerial advice rest on two grounds, either the fact that in some cases action on such advice may expose the Governor to the risk of breaking the law, which it is his duty to uphold,[1] or that he has Imperial interests to consider and Imperial instructions to carry out.[2] In neither of these cases does there seem to be on examination any fundamental reason for breaking the rule of responsible government, and the Governor might well be freed from legal liability and thus not put in the position of having to defy the law, and might also well be instructed to act always on ministerial advice. The only apparent exceptions to this rule which would convert him into a viceroy proper would be cases in which joint Imperial and Dominion responsibility was involved, as when British and Dominion troops were operating together in a Dominion, or when the question of the grant of Imperial honours was concerned.

But the question of the meaning of acting on ministerial responsibility brings us to a most important and characteristic difference between the constitutional practice of the United Kingdom and that of the self-governing Dominions, a difference which is often hardly realized through the vagueness of the term ministerial responsibility. In the United Kingdom it means in the first place that a minister must take responsibility for every act of the Crown; that, as the Crown can commit no wrong, if the Crown acts officially,

[1] Above, chap. ii. [2] Above, chap. iv.

its action must be countersigned or otherwise adopted by ministerial authority. In the second place it means that the minister is responsible to Parliament. These two considerations are enough to establish a parliamentary form of government as opposed to constitutions such as the constitutions of the German Empire and of Prussia, where the acts of the Sovereign are covered by ministerial responsibility, but the minister is not responsible to any power except the Sovereign. But in parliamentary government as practised in the United Kingdom there must be added the further rule that the King can only act on the advice of a minister who is actually holding office, and that without such advice he cannot act. This further point differentiates the constitutional practice of the United Kingdom from that of countries like Italy and Greece, where the King can constitutionally refuse to accept the advice of ministers provided he can find other ministers, or, more strictly, persons ready to become ministers and to accept responsibility for the action of the Sovereign.

It is true that this doctrine is not always accepted as part of the received constitutional law of the country. Is it to be contended that the Sovereign would have no power to dismiss a Ministry which, having forfeited the favour of the country, clung to office with the aid of a parliamentary majority which had notoriously ceased to be in harmony with the electorate, or, still worse, without a parliamentary majority at all? Would it not be the duty of the King to decline to accept the advice of such ministers and to give the people the free right to exercise their choice of a new Ministry through the action of their representatives in Parliament? The answer to both these questions is, however, less difficult than might be expected. The essential basis of the British constitution as it stands at present, is the close correspondence between the electorate and Parliament, which ensures that at the outset of a Parliament the Ministry of the day shall in great measure faithfully express the will of the majority of the electorate. The comparatively short duration of Parliament minimizes the

possibility of the discord between Parliament and the electorate becoming serious, while, it must be remembered, as the members of Parliament are subject to the same influences as the electorate, and also to the pressure of their constituencies, a clear change of feeling among the electors reveals itself among the members of Parliament. Of this there can be no more striking example than the resignation of Mr. Balfour's Government in 1905 when in possession nominally of a decisive parliamentary majority, which, however, through the change of feeling in the country, owing to the rise of new issues which were not present to the minds of the electors of the Parliament, had ceased to be really effective for constructional work. Even in such a case as this the balance of advantage lies in the strict application of the constitutional rule: any action of the Sovereign would have introduced yet a new factor into the situation as it existed in 1905 and have obscured the issues. Moreover, it is, and must always be, a matter of the most grave difficulty to decide whether the people really approve or not the existing Government, and it is not desirable that the Crown should be involved in action which must rest on doubtful calculation, and which in any case at once submits the person of the Sovereign to the bitterness of political discussion. In the second case the argument in favour of the inaction of the Crown is overwhelming: there is no real possibility of any Government defying Parliament for any considerable length of time: they cannot but meet Parliament every few months, and a distinct defeat in Parliament must be retrieved by an even more distinct vote of confidence, or resignation must follow.

In view of these considerations the statements that from time to time are made, that the Sovereign has a discretion to dismiss ministers[1] and to dissolve Parliament, cannot be taken too seriously. It was, of course, very freely suggested during the struggle over the *Parliament Act* that the King should decline to accept the advice of the Ministry to give an undertaking that he would permit the use of his power

[1] See, e. g., Sir C. Dilke, *Journal of Royal Society of Arts*, lvi. 344.

to create peers with a view to securing the passage of the Bill through the Upper House. But, while those who pressed this view were frequently indiscreet in their protest against the powerlessness of the Crown if it could not act as they wished, they ignored the fact that had the Crown acted on their advice the inevitable result would have been that the political strife would have changed from an attack on the privileges of the aristocracy to an attack on the monarchy, and the position of the Sovereign would have been gravely affected. It is easy to argue that a King who must accept the advice of his ministers serves no useful purpose, but the argument is as wrong as it is simple, and aims at the very existence of the British monarchy. The very fact that in the long run the Sovereign will act on the advice of ministers places the Crown in a position of great influence and effect when it seeks to exercise a moderating control over the action of the Government. The discussions between the Prime Minister and the King do not assume the difficult and hostile form of a dispute between equal authorities, but take the form of a discussion in which it is the clear duty of the Prime Minister and of the Cabinet of which he is the head to make every effort to meet the views of the Sovereign, and to make it clear that the action which they are taking is the deliberate will of the majority of Parliament and of the electorate. Such a position in the long run has far more effect in moderating political action than any effort made by one party to play the Crown as a pawn in their efforts to meet the tactics of the other, however unfair they may deem these tactics to be.

These theoretical arguments may be applied to the specific case of a dissolution of Parliament. It has recently been contended [1] that the power to require a dissolution is one which rests constitutionally with the King even against the desire of his ministers. Put in its most favourable form the argument runs that no self-respecting Executive confident in the support of the country would ever withhold

[1] See the discussion by Mr. James Caldwell and Mr. Swift MacNeill, *Times*, Sept. 22, 24, 29; Oct. 1, 1915.

its consent to an appeal to the electorate if desired by the Crown. If it did withhold its assent it could have no good grievance if it were carried out without its consent. If the result of the election were that the new Parliament returned a new Executive, it would be proof that the Ministry had no right to act as the Government: if on the other hand the Parliament supported the Executive, it would have little to complain of: it would have remained in office, it would be armed with a fresh mandate from the electorate, and Parliament would have five years to run.

The fatal objection to this view arises in the case of an Executive which for some reason is not prepared to dissolve in deference to the royal wishes. The Government in 1910 did so dissolve, but such a result may not always be possible: the Government may have very urgent work to do, it may think that the appalling cost direct and indirect of a general election is unjustifiable, or its followers in Parliament may decline to agree to a dissolution possibly at an early period after a previous dissolution. In that event the King cannot dissolve Parliament without their consent, and they still remain in office. The necessary steps for a dissolution of Parliament require ministerial authority, and therefore a Sovereign who was determined to dissolve Parliament against ministerial advice must dismiss the Ministry and appoint another before a dissolution is possible.

Now for such a dismissal of ministers there is absolutely no parallel since the eighteenth century, when in 1784 the King dismissed the coalition Ministry of Fox and Lord North. The oft-quoted case of the action of William IV with regard to the Melbourne Ministry is normally adduced to prove that that Ministry was dismissed and that *ex post facto* the full responsibility for the dismissal was accepted by Sir R. Peel, which if true would show that ministerial responsibility may be exercised *ex post facto*. But the publication of the Melbourne papers has shown once and for all that the example of dismissal is non-existent: with his characteristic easy nature Lord Melbourne wrote to the King saying that the latter might wish to change the

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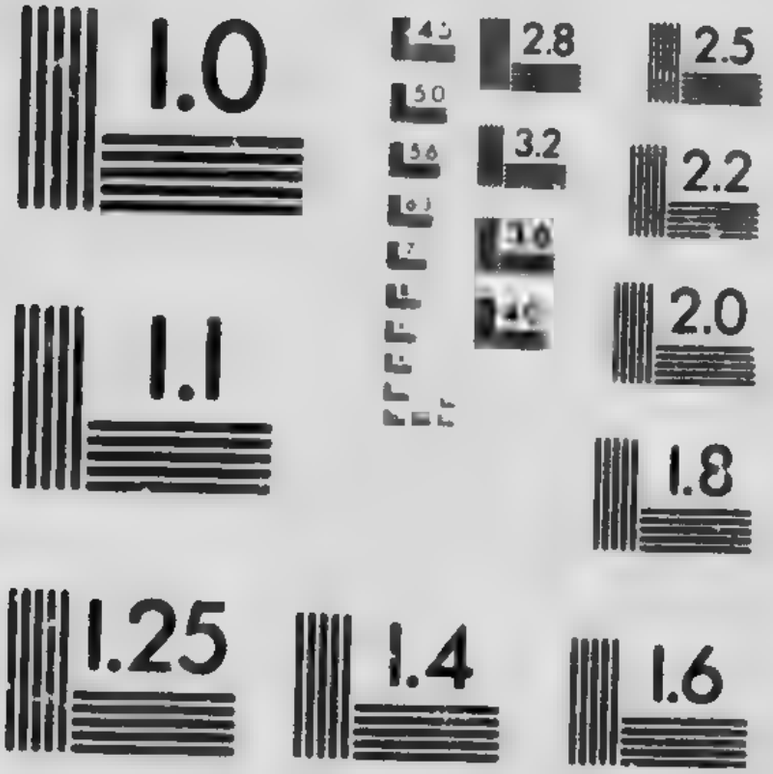

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Ministry, having regard to the losses of personnel it had sustained, and it is as clear as possible that this letter was an intimation of consent to change and, if the King desired that change, of resignation by the Ministry of the day.[1] Nor is it any more possible to find examples of dissolutions forced on governments by the Crown since the establishment of responsible government. It is not to be supposed for a moment that the Crown accepts all the advice of ministers: the Crown, as we know from the letters of Queen Victoria as well as from less authentic sources, frequently makes objections, especially in personal questions such as appointments, and ministers withdraw the peccant proposals.[2] But that is not the point: either the ministers of their own free will, on consideration of the circumstances, decide that a special point is not worth insisting upon in face of the known wishes of the Crown, or in the alternative they persist in their advice, in which case it is invariably followed.

Now in the self-governing Dominions and States the position is in marked degree different from the position in the United Kingdom, and in two diverse ways. In the first place the Governor of the Dominion or State does not share in anything like the same degree as the King the knowledge of the policy of the Government. It is notorious, and is exemplified very well by Queen Victoria's letters and the dispute which ended in the decision to afford knowledge of affairs to the late King, that the Crown is kept in the closest touch with all questions of foreign policy; doubtless the decision and the direction of that policy rest with the Secretary of State for Foreign Affairs, the Prime Minister, and the Cabinet, but the Crown is not merely informed of everything at once, but all decisions are, if possible, communicated to the Crown before dispatch or immediately after dispatch. The close attention of the Crown to foreign affairs is balanced by its attention to all important colonial

[1] See Sir W. Anson, *Law and Custom of the Constitution*, II. i, pp. xxxi, 38, 39.

[2] e. g. the case of Mr. H. Labouchere's proposed appointment to ministerial rank.

or domestic questions, and the Cabinet is expected, when any important step in domestic affairs is decided upon, to communicate it to the Sovereign for his information and consideration. There is no matter on which the Crown is not entitled to ask for information if it is not spontaneously offered, no matter on which it may not tender advice which must be received with all due respect even if it cannot always be given effect to.

The same relation should in theory exist between ministers and the Governor of a Dominion or State, but it would be idle to pretend that as a rule it does so exist. In some senses the Governor is undoubtedly brought into very close contact with the management of public affairs. It is the practice for innumerable small matters to be disposed of by order of the Governor in Council, and in the Australian States, New Zealand, Newfoundland, and the Commonwealth of Australia the Governor normally meets his ministers or some of them in Council once a week to sign the many documents which must be approved in Council. In this respect there is close resemblance to the procedure of making Orders in Council in the United Kingdom, but there is no comparison between the limited number of matters so dealt with in the United Kingdom and the number of questions thus treated in the Dominions. The report of Sir George Murray on the management of public business in the Dominion of Canada,[1] in which, however, the Governor-General does not actually attend the Council meetings, but merely signs the papers submitted, shows the overwhelming number of documents which pass through the Council, as a result of the determination of Sir John Macdonald and subsequent Prime Ministers to endeavour to keep control on the action of their fellow ministers, especially in the matter of appointments and contracts. The multiplicity and triviality of the questions dealt with render the normal Council meeting purely formal, and apart from these meetings the relations of a Governor with ministers are often merely ceremonial and social. There

[1] Dated Nov. 30, 1912.

is not in many cases recognized any general duty of informing the Governor of the affairs of the Dominion, and he is left to judge the policy of his Government from the press. Of course, to this rule there are many exceptions: at all periods of responsible government an able Governor with a sympathetic personality has been able to win the confidence of his ministers and to receive full information of their policies, but when all is said and done these cases are exceptions, and the perfect confidence which should exist between ministers and Governor is not often found. Nor when it exists is it always uncriticized: the great skill in securing confidence of ministers and in establishing with them really cordial relations shown by Sir Gerald Strickland in his administration of the Governments of Tasmania, Western Australia, and New South Wales was made a subject of attack by the opponents of the appointment of State Governors from outside Australia, and it was alleged that he exercised too decisive a control over his cabinets, probably the most effective compliment payable to the Governor, whose services were also the occasion of a more formal form of praise on the opening in Sydney of the Conference of State Premiers in 1915. Other cases of marked success in establishing close relations with ministers are of course not unknown: Lord Grey's indiscretions did not prevent his attaining really a considerable place in the regard of the Canadian Government, and Lord Gladstone's administration as first Governor-General of the Union was marked by very close relations with the Government of General Botha. But instances to the contrary are not rare: it was shown conclusively in the Victorian Parliament that Sir Thomas Bent, at the end of 1908, obtained a dissolution from Sir Thomas Carmichael under deliberate and grave misrepresentations of fact as to the possession by the Treasury of adequate finances in order to carry on the business of the State during the period of the general election, and in the Queensland crisis of November 1907 a serious factor in the disagreement between Lord Chelmsford and the Premier was the lack of complete confidence towards the former

shown by the latter, which led him into a distinct intemperance in his treatment of the situation.

On the other hand, while the Governor in one way is far less closely in touch with a Ministry than the Crown with the Imperial Government, at the same time the Governor is expected to exercise an independent discretion which is not attributed to the Crown by anything more formidable than occasional dicta. It is perfectly clear that in the Dominions and States the Governor is expected to exercise a personal discretion as to the grant or refusal of a dissolution of Parliament, and that he is not expected to act on ministerial advice unless he is satisfied that it is in the best interests of the Dominion or State. There are various reasons for this position: Dominion Parliaments are normally of short duration, three years in Australasia, five years in Canada and the Union, and frequent dissolutions waste time, prevent progress with important private and public measures, cost money, and impose upon members of Parliament, who are all salaried, the trouble of defending their pecuniary interest by appealing to their electors. Moreover, it is argued that Dominion and State ministers do not have that high sense of public duty which would cause an Imperial Government not to ask for dissolution unless it really considered it in the best interest of the country. Further, as all Dominion Parliaments are comparatively small, a dissolution may often have no pronounced result, so that every effort should be made to carry on without one, until the next general election comes by efflux of time. But, whatever the value of the reasons, the practice is wholly beyond dispute, for at the Colonial Conference of 1887 the question was formally debated at the instance New Zealand, and any change formally decided against by the great majority of opinion of the delegates present. Nor is there a single Dominion save Canada and the recently formed Union of South Africa in which many cases of refusal of dissolution have not occurred up to the most recent dates. Indeed there is no doubt that the refusal of dissolutions under certain circumstances by

Governors is deliberately counted upon. An amusing instance of this occurred in December 1913 in the State of Victoria.[1] The Government majority, which was over large, was unruly, and in a division on a Redistribution Bill the Government suffered defeat in the Legislative Assembly by thirty-one votes to twenty-nine on the question whether the numbers of that body should not be raised from sixty-five to seventy. In intent to bring his followers into better order the Premier, Mr. Watt, resigned office, and advised the Governor to send for the leader of the Labour Party, Mr. Elmslie. This gentleman accepted the duty of forming a Ministry, with the result that the malcontents of the Government side, seeing that they had no chance of being asked to form a Government and oust Mr. Watt, came into submission. Accordingly, after the new ministers had been sworn in on December 9, thus forming the first Labour Ministry ever known in Victoria, they were at once defeated on the motion for the adjournment of the House, and a week later, when the ministers were absent from Parliament seeking re-election as required by the Victorian constitution which in this matter is old fashioned, they were defeated on a direct motion of want of confidence, moved by Mr. Watt, by forty votes to thirteen. They then applied for a dissolution, which the Lieutenant-Governor promptly declined, so that Mr. Watt, who had been able confidently to reckon the failure of his opponents to obtain a dissolution, was able to return to power and to reconstitute as he desired his Ministry. The manœuvre, indeed, was precisely similar to that of Sir Elliott Lewis in 1909, in Tasmania, when he found that one of his followers, Mr. Ewing, was anxious to supersede him in office. He resigned, and the Governor sent for the leader of the Labour Opposition, not for Mr. Ewing. The gentleman sent for, Mr. Earle, asked for but was refused a dissolution of Parliament, and Sir E. Lewis was enabled to reassume office with the assurance that he had disposed for the time being of the disloyalty of Mr. Ewing.

[1] *Parl. Pap.*, Cd. 7507, p. 62.

The importance of avoiding a dissolution after a recent election may lead to curious results: thus after the general election in Newfoundland in 1908 the equality of parties made it clear that it was not possible to carry on the government satisfactorily, and Sir Robert Bond, the leader of the Government, asked for a further dissolution. The Governor declined this request and in his place appointed the leader of the Opposition to the post of Prime Minister, on the understanding that Sir Edward Morris would spare no effort in order to secure that the work of government should be carried on smoothly. But when all the efforts of Sir E. Morris to secure the adhesion of any member of the Bond party failed, and when it became, as a result, impossible for the House of Assembly to elect a Speaker, though Sir E. Morris proposed one of his own supporters for that office, he consented to dissolve Parliament once more, with the result that, having the advantage of Government patronage and control of the elections, Sir Edward Morris won a marked victory. It is clear that, under the exact circumstances of the case, the Governor acted in the only possible manner in giving the dissolution to Sir E. Morris, but an interesting position would have arisen had Sir Robert Bond had the good sense to allow one of Sir E. Morris's supporters to be elected Speaker, since then he could have defeated him in the House and further confused the issues.

The principle of discretion as regards dissolving Parliament applies of course to every Executive action of the Governor as the head of the Executive. There is no special privilege of the Governor as regards dissolutions, and the frequency with which he refuses dissolution and does not refuse his assent to other actions of his ministers results merely from the obvious fact that he can only refuse to act if he can find other ministers to carry on the Government, if the ministers whose advice he refuses to accept resign office as a result of that refusal. Normally a Ministry is too securely seated to allow the Governor to believe that he can find other ministers. He cannot leave his post without imperial permission, and if he tried to disregard the advice

of ministers without being able to find others, he would be compelled to ask them to return to office at much personal humiliation. But, if a Government asks for a dissolution, *ex hypothesi* it is not secure, and the Governor has a real choice of ministers which he can exercise. Nevertheless occasions may arise where the Governor can refuse something other than a dissolution, and one of these arose in New South Wales in July 1911. The Premier was then on absence in the United Kingdom, and two of the labour party then in power revolted at a decision of the Government on the lands question and resigned their seats in order to let their constituents have the opportunity of expressing their views on the issue. The result was to deprive the Government of their parliamentary majority, so that they could not carry a motion for the adjournment of the Assembly over the period necessary for the holding of new elections to fill the vacant seats. The leader of the Government then approached the Lieutenant-Governor, who was acting in Lord Chelmsford's absence in England, and asked for prorogation of Parliament over the interval. This would in effect have been to use the prerogative to effect what the Government had been unable to do in the normal way and the Lieutenant-Governor declined to act as desired, and asked the leader of the Opposition if he could form a Ministry. The latter, however, was only prepared to try if he could be given a promise of a dissolution of Parliament if he asked for one after his appointment as Premier, and, when the Lieutenant-Governor declined to promise this, he declined to make the attempt to form a Ministry, with the result that the Lieutenant-Governor asked the Labour Ministry to remain in office and accorded them the prorogation asked for.[1]

A further result from the discretion thus allowed to a Governor is the fact that he can impose conditions on the grant of a dissolution of Parliament, such as that the Parliament shall be called together at the earliest possible date or that supply must be obtained before the dissolution

[1] *Parl. Pap.*, Cd. 6091, p. 69.

is granted, though in the latter case it is obvious that to make his condition public might result in the Parliament defeating his aim. Nor can he be fettered by any objection raised by a parliamentary majority: thus in the Queensland case in 1907, when the Governor declined to give assurances as to overriding the Upper House when in disagreement with the Lower House, his Ministry resigned, and, as they had a large majority in the Lower House, secured from that House a refusal of supply and a protest against a dissolution, but nevertheless Lord Chelmsford gave the dissolution desired. The example is a striking instance of the power of the Governor to disregard ministerial advice, for the Ministry had so solid support in the country and in Parliament that the success of the Opposition in forming a Ministry which could win an election appeared from the first worse than problematical.

But while it is idle to deny the existence of this discretion, which means that ministerial responsibility can be applied *ex post facto* for an act which must really be taken by the Governor on his own initiative, it is much more doubtful if the continuation of the practice is desirable for an indefinite period. It is of course essentially a matter for the development of constitutional practice in the Dominions, since it has grown up with the full approval of the electorate, who feel that they have in the Governor a shield against the vagaries of party politics. But it must be admitted that in itself the practice is characteristic of immaturity and of defective development. The proper penalty for disobedience of the laws of responsible government by a Ministry is punishment by the electorate: it should not be any part of the duty of a Governor to remedy the defects of political conscience on the part of ministries, any more than that it should be part of the duties of the Crown to remedy the defects of ministries in the United Kingdom. Nor can a high sense of political obligation be developed so long as blame can be thrown on the Governor. It is a minor matter that the Governor is open to constant imputations of error in his actions and that such attacks may be very

strongly worded. Thus, when Sir T. Gibson Carmichael refused to accept the view that Sir T. Bent should not be given a dissolution in 1908, he was bitterly criticized because of failure to safeguard the rights of the electorate who were compelled to vote at the Christmas season.[1] When, again, Sir Harry Barron refused a dissolution to Mr. Earle in 1909 in Tasmania, he was accused of being under sinister influences.[2] The action of Lord Chelmsford in the Queensland case resulted in his censure by the local Parliament, and only the fact that the Premier was about to change his policy probably led to the leaving of the matter without a formal demand for his recall. The Governor-General of the Commonwealth has thrice refused dissolutions of Parliament and in no case without a good deal of criticism.[3] Indeed, it is obvious that if a discretion exists, the Governor will be criticized, and no real meaning attaches to the phrase that responsibility is accepted by the new Government which takes office, for it is open to Parliament to censure a Governor, while in the United Kingdom the King's conduct cannot be drawn into question in debate.

Moreover, the practice of allowing a discretion inevitably leads to placing Governors in false positions, as was shown in 1914 by the case of Tasmania. The position of politics in that State is rendered difficult by the fact that the Lower House is very small, containing but thirty members, and that these are elected by proportional voting in five six-member constituencies. The result is that with parties nearly equally divided between Labour and Liberal no Government has a very secure position. In 1912 Sir Elliott Lewis, the then Premier, resigned, as with parties at sixteen Liberals to fourteen Labour he could only carry on with full support from his party, and that could not be assured at least under his leadership. Mr. Solomon, who succeeded him, managed to carry on matters through the session of

[1] Melbourne *Age*, Dec. 7, 1908; *Argus*, Dec. 7, 1908, and subsequent issues.

[2] Hobart *Mercury*, Sept. 29, 1911.

[3] Turner, *Australian Commonwealth*, pp. 89, 100, 101, 217–21.

1912, though just at the end of the session one of his party, who had independent views, proposed to desert him. This move he countered by inducing the Speaker of the Assembly to intimate his intention of resigning, and, as the independent member did not finally succeed in making an agreement with the Labour Party, the proposal to eject the Ministry broke down, the vote of no confidence proposed being withdrawn.[1] But, in view of the difficulty of carrying on, Mr. Solomon asked for, and obtained, a dissolution, which resulted in giving him a Liberal in place of an Independent Liberal. In the beginning of 1914, however, the inevitable defeat occurred, and Mr. Solomon asked the Governor to accord him a dissolution of Parliament. It was clearly open to the Governor to grant or refuse the request at his pleasure: there was clearly a possibility of an alternative Ministry, and he had the onus of choice with the feeling that in either case he would be certain to give dissatisfaction. He not at all unnaturally formed the opinion that the grant of a dissolution to Mr. Solomon would not be likely to result in any clear majority, and he therefore refused the dissolution, whereupon of course Mr. Solomon resigned. The Governor then on April 3 offered Mr. Earle the leader of the Opposition the post of Premier on the distinct agreement that as Premier he would immediately advise the dissolution of Parliament, that the newly elected Parliament should be summoned before the end of May, and that, in the event of the office of Attorney-General not being filled by a duly qualified lawyer in practice, the Governor must reserve the right to obtain legal advice when he considered it necessary from other sources. These conditions were accepted by Mr. Earle and also by the other members of his Ministry, but on reconsideration Mr. Earle and his colleagues came to the conclusion that it would be preferable to carry on with the existing Parliament, and they proceeded to execute a complete *volte-face*. On April 7 Mr. Earle addressed a memorandum[2] to the Governor in which he recalled the fact that he had on April 3 demurred

[1] *Parl. Pap.*, Cd. 6863, pp. 111, 112.

[2] *Parl. Pap.*, Cd. 7506.

to the first two conditions imposed, and stated that he commanded the confidence of a majority of the House of Assembly and had given an assurance that he could carry on the Government. On these facts he respectfully submitted (1) that the exaction of the pledge to advise a dissolution of the House of Assembly was contrary to the principles and well-established practice regulating the conduct of parliamentary government, and (2) that the circumstances of the case were not such as to justify the Governor in forcing a dissolution on his ministers. To enforce the carrying out of the pledge would be to cause Mr. Earle to tender advice which he did not consider in the interest of the State, and it was not right to demand a dissolution when there was available a party in Parliament which could carry on government, and when there was no great issue at stake between the parties in the country. In his reply of April 8 the Governor pointed out that he had not in any way pressed Mr. Earle to take office, that he had laid down clearly the conditions which Mr. Earle had accepted, and that his motive in laying down these conditions was simply in order to secure the best advantage of the State by taking such action as promised the best chance of a stable administration.

Finding the Governor not inclined to consider their change of view as binding him to change his policy, the Government appealed to the House of Assembly, from which they obtained, Sir Elliott Lewis dissenting, the passing of an address in which they very respectfully expressed their opinion that the action of the Governor in imposing on ministers as a condition of their appointment an undertaking to agree to a dissolution of Parliament, whether the House approved the policy of ministers or not, was contrary to the well-established usage of responsible government and was undesirable, and requested the submission of the address, together with copies of correspondence on the subject between the Governor and the Premier, to the King. This step was duly taken, and in the meantime the Governor permitted his ministers to carry on their functions.

The decision of the Secretary of State was intimated in a dispatch of June 5, 1914, which was severely criticized in Australia as obscure and indecisive, two completely different interpretations being placed on its terms. The Secretary of State, while recognizing that the condition of affairs in Tasmania has been difficult owing to the practical equality of parties, definitely pronounced the view that the Governor's action in the matter was not in accord with constitutional practice. The grounds for this view were stated as follows:

The observance of the principles of responsible government requires that a Governor must be clothed with ministerial responsibility for all acts in relation to public affairs to which he is party as head of the executive. He cannot therefore perform any such act except on the advice of his ministers, and for performing it on such advice no political responsibility attaches to him personally. The question whether or not a dissolution should be granted is a purely internal affair and is thus regulated by the general rule. A Governor therefore cannot dissolve the Legislature except on the advice of his ministers. There have, of course, been not a few cases in which Governors have rejected advice tendered to them by their ministers that the legislatures should be dissolved. These do not, however, stand on a different constitutional footing from any other case on which a Governor may have found himself unable to accept the advice of his ministers. In all such cases the ministers either acquiesce in the Governor's action, in which event they accept responsibility for it, or leave the Governor to find new ministers who will accept the responsibility.

A Governor may feel it incumbent on him to consider with special care requests for dissolutions, but constitutionally he has not special powers in such matters. It follows therefore that he is no more entitled to impose on an incoming Ministry as a condition of admitting them to office that they should advise a dissolution of the Legislature, than that they should tender any other specified advice.[1] A Governor is, of course, entitled to discuss the aspects and the needs of the political situation freely and fully with his proposed new ministers, but he cannot go to the length of requiring them to give any particular advice as a condition of accepting

[1] See Sydney *Daily Telegraph*, April 13, 1914; *Argus*, April 13, 1914. The *Morning Herald* rather supported the Governor. Cf. *Round Table*, 1914, pp. 736–8.

their services without claiming a personal responsibility which does not attach to him.

I have carefully examined in this connexion the action of the Lieutenant-Governor of Nova Scotia in 1860, to which my attention has been drawn as affording a possible parallel to your action. In that case Lord Mulgrave had rejected the advice of his ministers that a dissolution should take place on the ground that it was improper thus to interfere with the procedure provided by law for testing the validity of elections of certain members of the Assembly. Before commissioning Mr. Young as Premier in succession to Mr. Johnstone, Lord Mulgrave required from Mr. Young an assurance that each case of alleged disqualification should be inquired into with as little delay as possible. This assurance was duly given by Mr. Young before he was entrusted with the duty of forming a Government. Viewed in the light of what had happened previously, Lord Mulgrave's action was in effect merely a reminder to Mr. Young that in taking office he would assume responsibility for the decision that the law must take its course. The case thus presents no analogy to that under discussion.

At the same time, while I consider that you should not have imposed terms on Mr. Earle, I recognize that he was entirely at liberty to decline the duty of forming a Government unless he was left with complete discretion as to the advice to be tendered to you. Instead of doing so, he decided to take office, and thus must be held to have accepted for the time being full responsibility for your action. He remained fully responsible until the Ministry determined to advise in the contrary sense, when the policy of dissolution ceased to be authorized by ministerial advice, but became a matter of your personal opinion, that is to say, no constitutional means existed of giving effect to it without another change of views on the part of ministers or another change of Ministry.

The dispatch dealt with a very difficult position caused by a breach of faith by a minister of the Crown and by a mistake on the part of the Governor, and this fact explains, no doubt, the obvious difficulties which its terms raise, and its apparent inconsistencies. To say that the Governor cannot perform any act as head of the Executive Government except on the advice of ministers is wholly inconsistent with the admission that he may refuse a dissolution

of Parliament to ministers, for in refusing a dissolution he emphatically does not act on the advice of ministers; and even if it is argued *per impossibile* that a refusal to accept advice is negative and is not included in the term act, still it is perfectly clear that the new ministers whom he is left to seek are not sought on the advice of the old ministers, who would not dream of tendering advice to the Governor to take others in their place. We must therefore fall back on the rule that a Governor must be clothed with ministerial responsibility either before or after his action, a position in which, as has been seen, he differs essentially from the King, who must be clothed—to adopt the metaphorical language of the dispatch—with such authority in advance. The rule, however, that ministerial responsibility *ex post facto* covers any action of the Governor renders improper the censure passed on the Governor for imposing conditions: the censure is one directed on the Ministry, and it is incorrect for a Secretary of State to censure a Ministry. The Governor's error in this reasoning becomes reduced to the mistake of not recognizing that his ministers were free to alter their minds, since there is no relation between ministers and Governor which compels them to adhere to plans matured beforehand, even for a few days. Moreover, the reasoning in the case of Lord Mulgrave's action is, it must be confessed, sophistical and unhistorical. Lord Mulgrave would certainly not have understood the version of his action given by the Secretary of State: he belonged to a generation which felt perfectly entitled to treat firmly Colonial Premiers in small colonies, and he simply acted as he reported he did: declined a dissolution and made Mr. Young Premier on a definite agreement, which he took good care, as his report shows, to have carried out. It is a blunder to think that the full doctrine of responsible government was realized fifty years ago: it is a plant of slow and gradual growth, and the mistake of the Governor in relying on that precedent to justify his action was due to the lack of historical sense: many things have been done in the early days of responsible government which

cannot now be done. The argument in the Secretary of State's dispatch would have left Mr. Young the option of discarding his pledge immediately on his appointment, the last thing which Lord Mulgrave would have permitted.

The truth is that these sophistical arguments arise directly from the false doctrine which permits a discretion to a Governor and allows him to choose between acting on advice from ministers, or disregarding their advice and seeking *ex post facto* for ratification. These voyages of exploration into the unknown are a mistake: they are, if Dominion statesmen would only realize it, inconsistent with full responsibility, and are signs of lack of political strength. Nor are there wanting signs that the future may see without any formal change some tendency towards the adoption of the more self-reliant and independent mode of procedure. This conclusion is based on the striking action of the Governor-General of the Commonwealth in 1914 in granting the request of his ministers for a double dissolution of the two Houses of the Parliament of the Commonwealth.

The circumstances of the request were exceptional. At the general election of May 31, 1913,[1] the Labour Ministry of Mr. Fisher appealed to the country not merely to return them to power, but also to give a verdict on six Bills for the alteration of the Constitution of the Commonwealth, which, in accordance with that Constitution, had been passed by the two Houses of Parliament and were therefore required to be submitted to the electorate. The six Bills all dealt with matters affecting trade and commerce, and they were brought forward because a long series of judicial decisions had established the invalidity of much Commonwealth legislation on these topics, and had made it clear that the Commonwealth Parliament had no power to regulate the carrying on of trade within the States either directly or indirectly.[2] It was therefore proposed by the first of the Bills to confer on the Parliament power to legislate as to trade and commerce generally and not merely that between the States and with other countries. The second Bill pro-

[1] *Parl. Pap.*, Cd. 7507, pp. 59, 60. [2] Below, Part II, chap. i, § 1.

posed to confer on the Commonwealth a general power of dealing with all corporations, whether Commonwealth, State, or foreign, in place of the existing power, which was restricted to foreign corporations and financial or trading corporations formed within the limits of the Commonwealth, and even with regard to them was held to be very limited in extent, as it was not open to the Commonwealth to regulate their mode of conducting trade, that being a matter for State law. The third proposed law provided for the conferring on the Commonwealth of plenary powers of legislation as to conditions of employment, relations of employers and employees, strikes and lock-outs, the maintenance of industrial peace, and the prevention of industrial disputes, superseding the very limited power of legislation for conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The fourth Bill extended this power of the Commonwealth to deal with conciliation and arbitration for the prevention and settlement of disputes in relation to employment on the railways of a State. The fifth Bill gave the power to legislate as regards trusts, combinations, and monopolies in relation to the production, manufacture, or supply of goods, or the supply of services; while the sixth Bill authorized Parliament, if both Houses in the same session by absolute majorities declared that the industry or business of producing, manufacturing, or supplying any specified services was the subject of a monopoly, to make laws for the carrying on of the business or industry under the control of the Commonwealth and acquiring for that purpose on just terms any property used in connexion with the industry. The power, however, was not to apply in the case of any industry or business conducted by the Government of a State or by a public authority constituted by a State. Similarly, concessions to State feeling were made in the case of the first two Bills by excluding from their operation trade and commerce on State railways if not otherwise subject to Commonwealth legislation and municipal or State governmental corporations, points in which the Bills differed from the proposals

brought forward in 1911 and then rejected by the electorate : on that occasion also the proposals were presented as two Bills only, a fact which was held by some authorities to have militated against their acceptance.

The result on this occasion was, as in 1911, the rejection of all six Bills ; but whereas on that occasion the Government were left in power, as the proposals were not brought forward together with an election, in 1913 the Government suffered defeat by one vote, 38 to 37, in the Lower House, though in the Senate they carried eleven out of the eighteen seats contested, and were in possession of the other eighteen which they had swept at the election of 1910, the tenure of office of senators being six years. The Government accordingly resigned office, being succeeded by Mr. Joseph Cook's Ministry.

The position of Mr. Cook was unenviable in the extreme, as he had in the Lower House only the Speaker's casting vote to rely upon, and in the Upper House was in a minority of twenty-two votes, a fact made the more serious by the excellent organization of the Labour Party. The only mode of action available was therefore to proceed with a view to bringing into effect s. 57 of the Commonwealth Constitution, which authorizes the Governor-General, if the House of Representatives should twice pass a Bill in the same or subsequent sessions, three months intervening, and if the Senate should on both occasions reject it or amend it in such a way that the Lower House would not agree, to dissolve both Houses of Parliament ; thereafter, if the Lower House should again pass the Bill and the Upper again reject or alter it, the Bill could be submitted to a joint session of the two Houses, and, if approved by an absolute majority of the members, be presented for the royal assent. If a double dissolution could be obtained, then there was a chance of getting rid of the dead weight of the opposition of the Senate. Accordingly the Government introduced two Bills into the Lower House when Parliament met, the one of which was intended to restore the postal vote at elections for the Commonwealth which had been repealed in the

session of 1911, and the other was to secure that no preference or discrimination should be made for or against any person in relation to any employment by the Commonwealth or by any department or authority thereof, on account of his membership or non-membership of any political or industrial association. The first of these measures was intended to remedy what was believed to be a hardship on women desiring to vote, and the second was a protest against the preference given by executive action in connexion with Commonwealth employment to labourers belonging to trade unions. Neither could be said to be a measure of first-class importance, and the purpose of the latter, as far as practical effect was concerned, was given by reversing the former executive authority, but both were chosen as brief points on which to base graver issues of principle. The Bills were pressed on, and, though for a time the Senate declined to consider them, after they had by the use of the closure been forced through the Lower House, on the ground that the Government had declined to treat seriously in that House two motions of want of confidence in the Government and the Speaker respectively moved by the Opposition, they finally proceeded with the consideration of both measures, rejecting the Bill to prohibit preference to trade unionists, and so altering the other Bill that the Lower House would not accept their amendments. In the following session of Parliament in April 1914 the Government brought the two Bills again forward, and promised a programme which would have upset a good many of their predecessors' actions, including in particular the arrangement by which the Commonwealth bank competed with the States' savings banks. Great difficulty was experienced in pressing forward the Bills, but eventually the Bill forbidding preference to unionists was carried through the Lower House, to be rejected on first reading by the Senate, and the necessary position for asking the Governor-General for a double dissolution was created. This application was duly made, and on June 5 the consent of the Governor-General to a double dissolution was announced.

The news of the Governor-General's consent was received with much surprise. The late Attorney-General of the Labour Government, Mr. Hughes, made public on June 9 a statement in which he expressly declared that the grant of double dissolution was unconstitutional. He laid stress on the fact that the Constitution gave the States equal representation in the Senate, and thus indicated that the Senate was intended to be a real power in the Constitution, and that it should not be reduced to a formality. Section 57 of the Constitution could not be applied to any Bill whatever without reducing the Senate to a nullity and destroying its co-ordinate legislative power. If it were right to dissolve the Senate for the sake of the Preference Prohibition Bill, it would be allowable to dissolve it for the sake of any measure, however trivial. Even, however, assuming that dissolution was constitutional in such a case, still this was not a case where it was expedient to use the power. The Governor-General of the Commonwealth had thrice [1] been asked to dissolve Parliament and had never before consented, but had instead invited some other statesman to form a Government, which had been successfully carried out. It had become an axiom of responsible government in Australia that the possibilities of the Parliament must be exhausted before a dissolution should be given. The first consideration of the Governor-General should be the carrying on of the business of the country, and the regular practice was to send for the leader of a strong party in the House of Representatives and to ask him to form a Ministry. There was absolutely no reason to suppose that the Government could secure a majority in both Houses. The figures of the last election were fatal to such a presumption; and, if a double dissolution would not give the Government a working majority, there was absolutely no justification for the dissolution. The only possible justification for such a dissolution must be that the Bill in question on which a deadlock had arisen was one which the Government had

[1] By Mr. Watson in 1904, by Sir G. Reid in 1905, and by Mr. Fisher in 1909.

a clear mandate from the people to pass into law, and this was not the case in the instance at stake.[1]

It is obvious that if the Governor-General had refused a double dissolution, the Government would have resigned and there would have been little chance of the new Government carrying on without a dissolution. But such a dissolution would have been only that of the Lower House, and on every calculation of probabilities which was possible at the time there seemed no reason to doubt that Labour would carry a real majority in that House. The country had seen without edification the struggles of a Government with a majority of but one, and with a solid minority in the Upper House. The peculiar mode of voting for the Upper House, the State forming one constituency with three seats vacant at each normal election made into six at a double dissolution, made it almost incredible that the Government could obtain a majority when in 1913 they had merely carried seven out of eighteen seats, and it was therefore probable that the country would prefer to give a real majority in the Lower House to that party which was securely entrenched in the Upper. There was also the possibility, perhaps the probability, that the Labour Government could have carried on without a dissolution, since the organization of the Government Party was not so secure as that of its rival, and some members or member of it might have agreed to support a moderate Labour policy.

The position was therefore that all the evidence pointed in favour of the Governor-General, if he adopted the Australian view of responsible government, deciding to refuse the dissolution and to ask the Labour Party to form a Government. That with all these facts present to Sir Ronald Munro Ferguson he should have decided to grant a double dissolution is only susceptible of explanation on the ground that he felt that it was best to adhere to the principles of responsible government as they exist in their purest form in the United Kingdom. In a very real sense his action, which was

[1] Cf. *Round Table*, 1914, pp. 550–2.

not altogether well received by Labour circles,[1] constitutes a landmark in the history of responsible government in the Commonwealth, for three of his predecessors had declined dissolutions in cases where a fair claim for a dissolution had undoubtedly been made, and Labour Governments had twice been the sufferers by the refusal.

Recovering from the shock of surprise at the decision of the Governor-General, the Senate on June 18[2] presented an address asking for the publication of the communications between His Excellency and his advisers relating to the simultaneous dissolution of both Houses of Parliament, a request which was declined on ministerial advice by the Governor-General. On June 19 much more important action was taken. In the preceding session of 1913 and in the present session the Senate had formally passed once more the six Bills regarding the alteration of the Constitution which had been rejected at the election of May 31, 1913, and they now passed an address to the Governor-General praying that in accordance with s. 128 of the Constitution he would be pleased to submit to the electors on the day to be fixed for the taking of a poll for the election of members of the House of Representatives to the next Parliament the six proposed laws for the amendment of the Constitution which had been passed within the statutory interval by the Senate and not passed by the House of Representatives. The section of the Constitution referred to provides in the case of a proposed law for the amendment of the Constitution being twice passed with an interval of three months in the same or subsequent sessions by either House and rejected by the other, that the Governor-General may submit the proposed law to the electors in each State qualified to vote for the election of members of the House of Representatives. Now the wording of the Act is clearly permissory, and does not impose any obligation on the Governor-General so to submit the law, but it is perfectly clear that it gives him a discretion to do so. The question

[1] See Commonwealth *Debates*, 1914, pp. 1971 seq., 2251 seq.

[2] Ibid., pp. 2257–61.

therefore arises whether this discretion is personal or whether it is intended to be exercised on the advice of ministers, and in this connexion the following consideration is of great weight. If the permission to refer is to be made dependent on ministerial advice, then the clause definitely places the Senate in a false position, for the Ministry of the day must and does depend on the majority in the Lower House, which alone possesses financial initiative, and therefore it would rest with the Government of the day, i. e. the Lower House, to decide if the Bills passed by the Upper House should be submitted to the electors. But the clause manifestly is intended to put the two Houses in this regard on an equal footing, and this is right, for the Senate is representative in theory of the States, and the House of Representatives of the people at large, and an amendment may be properly brought before the people on the volition of either party. It must therefore be concluded from the mere terms of the Act, no less than from its history— it was framed in the first instance by men who were not convinced of the necessity of responsible government in the parliamentary form—that the discretion was intended to be personal to the Governor-General, and not to be exercised on the advice of his Ministry.

Taking this to be the clear meaning of the Act,[1] the decision of the Governor-General to decline to submit the Bills could hardly be held to be justified. He had decided to give a double dissolution, which meant that great issues were to be decided and there could be no more appropriate time for deciding also the great issue of the referenda : not to do so might easily be held to be unfair to the Labour Party, who, if victorious in the contest, would still have to face the trouble of the voting on the referenda without the excitement of a general election to help the bringing of voters to the poll. On the other hand, as many good judges attributed the victory, such as it was, of the Government at the polls in 1913 to the fact that the voters came forward in unusually great numbers in their favour because they disliked the referenda though they did not dislike seriously the Labour

[1] Cf. W. Harrison Moore, *Commonwealth of Australia*, p. 600.

Government, it might have been wise for Mr. Cook to advise the Governor-General to exercise his power. At any rate, the fact that the Governor-General accepted the advice of his ministers and declined to submit the referenda to the electorate, can be explained and justified only on the ground that the British principle of responsible government should prevail in Australia. Manifestly it is not open for an successor without grave injustice to act in future in the matter of s. 128 save on ministerial advice. Doubtless this was not the view of the fathers of federation, but responsible government is too strong to be resisted in the long run.

The final history of the episode is curious: war broke out before the elections had actually been held, and the Labour Party pressed energetically that steps should be taken—by means of Imperial legislation if necessary [1]—to revive the Parliament then defunct. This was refused by the Government, apparently under the idea that they could secure a favourable result at the elections in view of the objections to disturbing a Government in office at such a crisis. The view was as short-sighted as ungenerous: the Government suffered complete and not undeserved defeat an was replaced by a Labour Administration.

2. The Dismissal of Ministers

The undesirability and unsoundness of the existing doctrine of the discretion of the Governor in granting a dissolution is borne out by considerations of the allied question of the dismissal of ministers by a Governor. There is no conceivable reason why in itself it should be more legitimate for a Governor to refuse a dissolution than to dismiss ministers, and the only real ground of discrimination must be that the one course is much less risky than another. If a Governor refuses a dissolution, he runs a fair

[1] This was a moot point: mere re-election by agreement of the sitting members was also proposed. It was agreed that a dissolution proclamation ended the life of Parliament and could not be re- " d. Cf. *Round Table*, 1914–15, pp. 210, 211. See also Part II, chap. i,

chance of seeing his ministers replaced by others who will in a sense owe their position to himself, since *ex hypothesi* the Ministry which asked for the dissolution was in an unsatisfactory parliamentary position. But it is different if he has to dismiss ministers, and he must, before he can risk the action, be very sure of his ground. Lord Chelmsford, for the much less serious step of refusing to give a pledge to swamp the Upper House of Queensland in 1907, narrowly escaped a motion for his recall, and a dismissed Government would certainly, if returned to power, secure the departure of the Governor who dismissed them. But both actions are essentially wrong in strict theory, though neither dismissal nor still less refusal of a dissolution can be said to be extinct.

The question of dismissing ministers nearly always arises when they seem to have forfeited the confidence of the country, but cling to office either because they have still a parliamentary majority or Parliament is not in session. Reference has been made above to the fact that in the United Kingdom the Crown leaves the ministers to work out their own ruin in the due course of events, but in the Dominions less patience is sometimes shown. In this connexion an extraordinarily interesting account of a hitherto unknown incident in Canadian history has been given by Sir Charles Tupper in connexion with the fall of the Government of Sir John Macdonald in Canada in 1873.[1] At the autumn session Mr. Mackenzie submitted a resolution of want of confidence in the Government. Party feeling ran high and the utmost bitterness prevailed. During the progress of the debate, according to this account, Lord Dufferin, the Governor-General, sent for Sir J. Macdonald and asked him to resign. When Sir J. Macdonald took Sir Charles Tupper alone of his colleagues into his confidence, the latter proceeded to Government House and sought an interview with the Governor-General, of which he gives the following account:

I said, addressing Her Majesty's representative, 'I think you have made a fatal mistake in demanding Sir John's

[1] *Recollections of Sixty Years*, pp. 156, 157.

1874

resignation. You are to-day Governor-General of Canada, and respected by all classes; to-morrow you will be the head of the Liberal Party, and will be denounced by the Conservatives for having violated every principle of constitutional government. If Her Majesty would to-morrow undertake what you have done she might lose her throne.'

'Well, what do you advise me to do?' asked Lord Dufferin.

'I desire to recommend that you cable the Colonial Office, and ask what it thinks of your action.'

The result of that interview was that Sir John was aroused from his bed at 2 o'clock in the morning, and notified that Lord Dufferin had recalled his decision.

Curiously enough Sir Charles Tupper himself was to suffer in somewhat the same way as had been the proposed fate of his predecessor. In 1896, when the result of the elections seemed to prove that his Ministry was defeated, Lord Aberdeen insisted on exercising his own discretion as to the acceptance of ministerial advice: thus his proposals for the appointment of senators were rejected, many of his recommendations of appointment of officials were not accepted, and Lord Aberdeen declined to approve the granting of a contract for a steamship service to the Allan line.[1] In point of fact the new Government would no doubt have cancelled any of these appointments which it could cancel, as it did many others, and retribution fell on the Liberal Party in 1912, when the incoming Government cancelled many of their appointments, both important – as, for example, the members of the Waterways Commission – and unimportant. Canada has also been the scene of repeated dismissals of ministers by provincial Lieutenant-Governors, and, though both Mr. Letellier in Quebec and Mr. McInnes in British Columbia were dismissed for their exercise of this right, their fate has not deterred others from following with more good fortune the same course.[2] It was action of this kind by the Lieutenant-Governor of British Columbia, in 1903, which terminated the political chaos of that State, and began the régime of stable government, and in 1915 the Lieutenant-Governor

[1] *Recollections of Sixty Years*, i. 243.

[2] *Responsible Government*, i. 226–45.

of Manitoba brought about the retirement of his Government.[1] It had, after a long term of control, been weakened at the general election of 1914, when it lost most of its majority, and strong allegations were made that the contractors for the Manitoba Parliament buildings had arranged to find money for electoral purposes, a practice which is not by any means unknown in the Dominion. The Lieutenant-Governor eventually practically forced ministers to appoint a commission of investigation, and feeling that, discredited as was his Government, he could not continue in office, the Premier resigned office, and a Liberal Government succeeded him.

It is rather curious to contrast the comparative satisfaction with which such action on the part of Lieutenant-Governors in Canada is received by the public with the indignation which would undoubtedly be excited by similar proceedings if carried out in Australia by a Governor, at any rate if not an Australian by birth. In Newfoundland, also, there is record of a Governor who kept a Ministry in power in 1894 against a parliamentary majority, until election petitions had reduced that majority out of existence. But it may very gravely be doubted if it is ever worth while pressing these matters, in place of leaving them to be dealt with in the ordinary course of Parliament. The view taken by Lord Aberdeen in his dispute with Sir C. Tupper was that the Government had not the control of Parliament, and therefore should not exercise the full powers of an unfettered Government, and Lord Aberdeen's view was obviously correct: it was not right for a retiring administration—for its fate was inevitable—to deal with public affairs as if it had authority. But that is not the question: the point at issue is whether it is necessary that the Governor should interpose his authority in the matter to prevent the Government acting contrary to propriety. Theoretically a case can be conceived in which, as in the case of the United Kingdom, it might be necessary for a Governor to break all rules, and interpose for the

[1] *Times*, May 13, 1915.

safety of the State, but in all normal cases there can be no justification for this action. Time will bring its own punishment if necessary for any improper conduct.

Nor is there lacking recent evidence of the acceptance of this view. In the Newfoundland crisis of 1908,[1] the Governor expressly refrained from putting any pressure on his ministers when he found that they had no Parliamentary majority, and declined to act on the request of the Opposition, that he should call on the Ministry to resign, because it had no Parliamentary majority, a rather amusing request, since the Opposition equally had no majority, though it is true that the loss of the Government majority, taken in conjunction with the fact that the Government had appealed to the people with all the advantages of control of the machinery, meant that the Government had suffered in effect a defeat. Nor would he accept the opinion of the leader of the Opposition, that he should not consent to any official appointment or contracts being made. But, on the other hand, he declined to commit himself to any general approval of anything his ministers might wish to do, expressed clear views as to the duty of meeting Parliament in due course, though not pressing for any unusually early meeting, and finally declined a dissolution. His conduct throughout was marked by excellent judgement, and by as careful an application of the principle of responsible government to Newfoundland as is compatible with the imperfect development of that principle in parliamentary practice there. On the other hand, a singular instance of the undeveloped condition of Newfoundland political thought occurred some years afterwards, when the Governor, Sir Ralph Williams, was asked to dismiss one of his ministers on the ground that he acted improperly in several ways, and in particular had misused his position in private interests.[2] The Governor, in a long examination

[1] See *Correspondence between H. E. the Governor, Sir Edward Morris, and Sir Robert Bond*, St. John's, 1909.

[2] Newfoundland *Daily News*, June 29, 1912; *Daily Telegraph*, June 28 and 29, 1912.

of the charges brought, was able to satisfy himself that the minister had not forfeited his right to be retained in office, though he had acted somewhat unwisely, but clearly the position in which the Governor was thus placed was an impossible one. There was, however, a precedent in Newfoundland itself, for an earlier Governor had dismissed Mr. Morine from his office, without the Ministry resigning office.[1]

An example of the more normal procedure may be found in the case of the reverses suffered by the Ministry of Sir Joseph Ward at the New Zealand election of 1911. The result was not unequivocal: the Government secured nearly half of the seats, but the decision was left in the hands of four Labour members, who were not absolutely certain to vote one way or the other. There was naturally a demand made by the Opposition that the Governor should intervene at least to the extent of compelling ministers to face Parliament at an early date, if not to leave office. Lord Islington, however, deemed it best to allow matters to take their parliamentary course. When Parliament met on February 15, 1912, an attractive programme was placed before the House, which resulted in the defeat of a motion of no confidence by the casting vote of the Speaker. Sir J. Ward, however, resigned office, on the ground that he did not desire to carry on without a majority, his place being taken by Mr. T. Mackenzie. Then followed a period from March to July, in which Parliament was adjourned, and the Ministry was in office without any real mandate, and again it was suggested that the Governor should intervene. This step was, however, not taken, and the matter was more satisfactorily disposed of by the defeat of the Government on July 5 in Parliament by a majority of eight votes, a result which had been contributed to in no small measure by the delay in meeting Parliament. Mr. Mackenzie then accepted the office of High Commissioner for the Dominion in London, an office in which he has represented the Government with ability and distinction.[2]

[1] Discussed at length in the Canadian House of Commons on March 29, 1912.

[2] *Parl. Pap.*, Cd. 6091, pp. 68, 69; 6863, p. 116.

It must always be remembered that strong action on the part of a Governor is more likely to confuse an issue than not: it at once tends to cast in the scales the strong feeling which in any community with parliamentary government is raised against an appearance of arbitrary authority, and thus intervention by a Governor may interfere with the natural play of political forces, and do more harm than good. The best work of a Governor in these cases can be done not by active intervention, but by the use of his influence in favour of the adoption by his ministers of the true constitutional course, and in the majority of instances such action is probably more effective in the long run than any active use of reserve powers, which, while doubtless existing, should be reserved for the most serious cases of trouble. A Government may seem weak in suppressing a serious strike, as was undoubtedly the case with the labour troubles at Adelaide in 1910, but the idea that the Governor should on that account dismiss his ministers was an absurd one, and would have, if carried out, placed the Government in the comfortable position of being able to divert attention from their own shortcomings by an onslaught on vice-regal interference.

It is important to note that in order to adopt in its full sense the British doctrine of ministerial responsibility no formal change is really necessary. It is true that the royal instructions to the Governors of the Australian States, Newfoundland, and New Zealand expressly provide that in executing his official duties the Governor is to act with his Executive Council, but may dissent from them if he deems fit, reporting in that case to the Secretary of State his reasons, but the practice in the case of the federations, of the Union, and the Canadian provinces, where no such instructions are given, is the same as in the cases where the instructions permit dissent. The omission of the provision of the instructions might therefore be made without affecting the actual practice, and, on the other hand, it would not be desirable to replace the instruction by a general rule that the Governor must always act on the

advice of Ministers. Constitutionally the proper practice is clearly to omit the mention in the instructions of the right to act against the advice of ministers, and to leave the action to be regulated by usage.[1] The change from the present system might be helped by an agreement or expression of opinion at an Imperial Conference, as was suggested, though unsuccessfully, by New Zealand in 1887: times have changed since then, and the matter is ripe for reconsideration. The actual mode of the change becoming operative would merely be that on the first occasion of any request for a dissolution, in a case where there could be on earlier precedents any grounds for the exercise of the discretion to withhold it, the Governor should grant it on the express ground that he was following the constitutional practice of the United Kingdom, leaving it to the electorate to decide if in their opinion the dissolution was properly advised by the Ministry.

[1] The omission in the case of Canada is due to the action of Mr. Blake as Minister of Justice; and it has been followed for the Commonwealth and the Union. In no case has the change made any alteration in the practice.

B. THE LEGISLATURE

CHAPTER VI

THE LEGISLATIVE SUBORDINATION OF DOMINION PARLIAMENTS

A DOMINION at the present time is essentially, from the point of view of international law, not a sovereign State, though certain concessions have been made to the practical position of a Dominion, and the Parliament of a Dominion, and *a fortiori* of a State or a province, is inferior to that of a sovereign Parliament. Such a Parliament has, in the eyes of international law, an unfettered legislative control over all persons actually within its territorial boundaries, including in that term a certain area of sea adjoining the coast, whether that sea is strictly to be regarded as part of the territory of the State or is merely subjected for definite purposes to its legislative control, and, though it cannot exercise its legislative power over foreign territory, it has a right to regulate the conduct of its subjects wherever they are, and to punish them for acts on foreign territory if it sees fit to do so. Moreover, it has a clear right to regulate all persons on board its own ships wherever they are, though of course in the territorial waters of foreign countries these persons are subject also to the foreign jurisdiction, and its own subjects on foreign ships, in which case again there is a double jurisdiction. Further, in the event of a treaty being made by which a foreign State permits the exercise of jurisdiction actually by courts established on the foreign territory, a sovereign Legislature can provide for the exercise of such jurisdiction, the constitution of courts to exercise it, the code of procedure to be applied, and the substantive law. A sovereign Legislature should in its legislation respect any treaties by which the country for which it is the Legislature is bound to other

powers, but the obligation is moral and political: it is not a legal burden diminishing the sovereignty of the State: no court has yet been established in any branch of international law which can examine the legislation of a sovereign Legislature and pronounce it invalid or even incorrect.

Moreover, a sovereign Legislature is not bound within the limits of the State as they exist at any one definite moment: it can annex territory, it can cede territory, it can consent to the uniting of the State with another State, even though in such an act it loses its own sovereign character, and is merged in a new body or continues its existence in a new and dependent form: it may assent to the creating of a new Parliament distinct from the former units, which disappear as in the case of the union of Scotland, Ireland, and England, or it may remain, but surrender part of its authority to a federal Parliament. Finally, without any new State unit being created a sovereign Parliament may extinguish itself, or may transfer all its power to some other body or individual, whether directly or indirectly.

Now, in practice, the differences between the ambit of the powers of a Dominion Parliament and a sovereign Parliament like that of the United Kingdom are not very noticeable. The main object of a Parliament has always been in recent times the legislation for the actual territory of the State, and for the guidance of the inhabitants of the State, and extra-territorial legislation has never been a very considerable part of its functions, still less is it normal for a Parliament to meditate federation or suicide in any form. Nor in its field of legislation is it usual or frequent for the Parliament to be subjected at the present day to any form of control, so that the normal working of Parliament in the self-governing Dominions is far more analogous to that of the working of the Imperial Parliament than might be judged from a mere consideration of the differences between the legal powers of the one and of the other. In this fact lies the explanation why in the main it has been possible for so many decades to conduct without serious friction or appreciable difficulty the relations of the

Imperial and the Dominion Governments: causes of dispute have been on the whole few, and tend to grow fewer. The existence of any restraint is naturally, however, objectionable in itself to the growing self-respect of the Dominions, and it is of importance to examine in detail how far that limitation is necessary, and how far it can be relaxed.

The first of the legal limitations on the power of Dominion legislatures is that arising from the nature of a Dominion as a dependency in the sense of international law. It was long doubted whether it was in the power of local legislatures to deal with the subject of naturalization. It was pointed out that the admission of an alien to nationality must be an act of sovereign power, and that therefore there could be no authority in a local body to grant naturalization. The argument was not convincing, and not only was the power to grant naturalization freely exercised, but its validity was expressly recognized in the Imperial *Naturalization Acts*, of 1847 and 1870, which, however, laid it down expressly that the validity of such naturalization was confined to the colony in which it was conferred. The Acts thus recognized the essential fact that a Dominion is a dependency, and that it cannot have inherent in the powers of its Parliament the right to make a man a British subject throughout the whole of the British Dominions. Nor again can a Dominion Parliament authorize the declaration of war or the making of peace with a foreign power, for these are powers which appertain to sovereignty, and therefore cannot be exercised by a Dominion Parliament as such, under its power to legislate for the peace, order, and good government of the Dominion. It follows, therefore, that, while a Dominion Government might decide to take no active steps to intervene on behalf of the United Kingdom in war, and though it might pass legislation which would undo the effects produced by a declaration of war on the status of alien enemies residing within its limits, it could not by Act of Parliament declare itself to be neutral, for such a declaration would be to deny that it was a dependency of the United Kingdom, and as such would be *ultra vires* the Dominion Parliament. Nor again could

a Dominion Parliament alter the succession to the throne of the United Kingdom and the British Dominions beyond the Seas, or change the title of the King, for these are things which only the sovereign Parliament can perform.[1] More important than these considerations is the fact that a Dominion Parliament cannot extinguish itself on its own motion. It is appointed to be a Parliament, and it must continue to be that Parliament for the Dominion. In the case of proposed federation it is obviously right and proper that the Legislature should express its desire to agree to the federation and to approve the terms, though that course is not essential if it can be ascertained otherwise, e.g. by a referendum, what the electorate desire, but the actual power to federate must be conferred by the Imperial Parliament, as it was conferred in the case of Canada, the Commonwealth of Australia, and the Union of South Africa. Nor could a Dominion Parliament absolutely merge itself in some other form, if that form could not be regarded as a Parliament. To take an extreme case, if a Dominion Parliament were to transfer all its legislative authority to a single person, it would be open to grave doubt whether, assuming that all the ordinary formalities for a change of constitution had been carried out, nevertheless the change from a Parliament which is a deliberative body to a single individual could be deemed to be really within the power of the Parliament.

It will be seen at once that these cases are all very hypothetical and unimportant from the point of view of practice. It is more important to realize that the actual powers enjoyed by a Parliament of a Dominion without any special delegation of sovereignty — for any sovereign power whatever could be conferred on a Dominion by the Imperial Parliament — are extremely wide, and are limited only by the discretion of Parliament. The law courts have absolutely no right to inquire into the motives or purposes of any piece of legislation of a Dominion Parliament.[2]

[1] See *Parl. Pap.*, Cd. 708.

[2] *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1912] A. C. 571.

To take an extreme case, if the Union Parliament of South Africa should impose a tax of £100 a year on every person of British origin, the Act might well be one which should be prevented from having any operation by the refusal of the royal assent, but if that assent were accorded no court could annul it, because it was clearly aimed at ending the connexion of the Union with the United Kingdom and bringing to a termination the state of dependency of the Union on the United Kingdom. In so crude a form as this no issue has ever arisen, but in the case of the Dominion of Canada it has been sought to have federal Acts set aside on the ground that the legislation, if passed, would have a detrimental effect on the subordinate divisions of the Dominion, and was really an encroachment on the powers of the provinces, but such representations have never succeeded unless it could be shown that the Act was not within the orbit of the legal powers of the Dominion, whatever the motive of passing it might be, and whatever effect might be likely to result.

Nothing is more striking as a proof of the wide authority of the Parliament of a Dominion in striving for its ends than the right which is accorded to it to delegate to other bodies some measure of legislative authority. It has long since been established law that the maxim *delegatus non potest delegare* has no application to a Dominion Parliament,[1] and in virtue of this power many corporations, municipal and otherwise, have been empowered to make by-laws with the force of law when made within the limits of authority conferred by the Parliament in each case. A still more daring step has recently been undertaken in the form of substituting for the normal method of parliamentary legislation a method in which the popular vote is given full play.

It was provided by an Act (c. 2) of the province of Saskatchewan, passed at the first session of the third Legislature, that after the coming into operation of that Act no Act of the Legislature should take effect, unless it was a supply Act, until ninety days after the close of the session, unless

[1] *Hodge* v. *The Queen*, 9 App. Cas. 117.

a contrary intention was expressed in the Act, and unless in that case the Act was passed at the third reading by a two-thirds majority of all the members present at such reading. If, however, not less than five per cent. of the number actually voting at the last election petitioned for a referendum, the operation of the Act was to be further delayed until it could be so referred to the people. Similarly, any number of persons not less than eight per cent. of the voters at the last election could petition the Legislature to pass a measure a copy of which must accompany the petition, and if not passed by the Legislature in the next session the measure must be presented to the people at a referendum. But no such Bill could be proposed which imposed a charge on the public revenue, or was not certified by the Attorney-General as being in his opinion within the legislative competence of the province. In either case the voters at the referendum were to be the electors, and the coming into force of the Act was to depend on their decision. If, on the other hand, they approved a proposed Act, it was to be enacted by the Legislature at the next session without substantial change, while if they disapproved it no further petition for the Act could be made for three years. The coming into operation of the Act was, however, made by c. 3 to depend on the result of a referendum, and was made dependent on the casting of thirty per cent. of the votes polled in its favour, and as this did not happen the Act fell to the ground.

Not discouraged by the proceedings in Saskatchewan, Alberta, by c. 3 of the Acts of 1913, provided for the system of referendum and initiative: without following in exact detail the Saskatchewan Act, the provisions are practically identical in substance, but there is no automatic provision for deferring the operation of any Act, the power given being merely that the Legislature may defer the operation of any but the supply Act. The numbers of voters who may demand a referendum or propose a law other than a supply Act, are fixed at ten and twenty per cent. respectively, in place of the low figures of five and eight per cent. An Act

which on the referendum is not approved is to be repealed in the next session, and an Act proposed by the electors is to be enacted if approved by the voters at the referendum.

In both cases it will be seen that supply Acts were excluded from the purview of Acts which were to be delayed in operation—unless of course this was desired by the Legislature—and that in both the right of initiative was denied in the case of supply Bills, doubtless for the reason that all supply must be recommended by the Lieutenant-Governor under the terms of the *British North America Act*, 1867, and that therefore the surrender of this privilege to the electors would be unconstitutional, as well as suicidal, since no Executive could ever manage the finances of a province if it were open to electors to make proposals of supply which might or might not be made effective by a referendum.

In the case of Australia, the initiative and referendum form established parts of the legislative proposals of the State and of the Commonwealth Labour Parties, but so far no progress has been made in pressing through these proposals. An elaborate Bill introduced by the Labour Government in Western Australia in 1913[1] providing for initiative and referendum was rejected by the Legislative Council.

It would be premature to express any opinion as to how far these proposals of initiative and referendum are consistent with the fundamental legal powers of the Dominion Parliaments. The referendum cannot be considered as seriously open to question: the effect of the referendum is simply to decide whether a measure the exact terms of which are contained in the Act as passed shall take effect: it is, viewed in essence, nothing more than a local veto Bill applied to the whole community: it is conditional legislation, which had always been regarded as perfectly valid. It is more difficult to feel assured as to the case of the initiative in the form in which the Alberta and Saskatchewan

[1] The Premier ingenuously commended the Bill on the ground that the mention of the Saskatchewan Act in the *Report* of the Dominion Department of the Colonial Office (*Parl. Pap.*, Cd. 6863, pp. 38, 39) showed the value attached to the system by the Colonial Office.

Acts enacted it. It places a definite constraint upon Parliament to pass an Act in a form prescribed by the electors; it gives them no power to vary the Act in any point of substance, however defective it may be found to be. It deprives, in fact, Parliament of its deliberative function and hands that over to the press, and that too in the most unfortunate manner, for, while a Bill can be amended in Parliament, in the case of the initiative it cannot when once put in shape be changed in substance. Experience shows that practically all Bills, and certainly every measure of any consequence, require careful amendment, and the new procedure prevents that being done. The initiative in this form clearly reduces to a farce the proceedings of Parliament, and it seems therefore that its validity may be called in question on that account. It would be a very different thing if the measure as petitioned for were merely to be debated by Parliament, or even accepted in principle by Parliament, when it could fairly be said that Parliament still retained some useful function.

Closely connected with the limitation imposed by the fact that a Dominion is a dependency is that arising from the limitation of the Legislature to the actual territory of the Dominion. The rule acts with a certain symmetry and convenience, for it leaves the Imperial Parliament the sole and undisputed right to deal with such important things as the exercise of jurisdiction over British subjects and British protected persons in such places as China, Siam, Persia, and the Ottoman Dominions: further, it leaves the British Parliament dominion over the high seas so far as that power may be exercised at international law. But the symmetry is not perfect and the restriction is not altogether without disadvantages, apart from the question of merchant shipping which will again[1] occupy our attention. The nature and the extent of the territories of the Dominions for the purposes of jurisdiction is a point of the utmost difficulty: it was long in dispute between the United States and the United Kingdom to what extent the

[1] Below, chap. x.

waters of the bays of North America could be deemed to be territorial. It was contended by the Government of the United States that the three marine mile limit applied to all these bays, that the line must be drawn following the sinuosities of the coast, and that no water could be considered to be territorial which was not within a distance of three marine miles measured from some point of the shore at low water mark. On the other hand, the British Government claimed that the term bay meant that the three mile line was to be drawn from an imaginary line drawn across the bay when it first definitely assumed the configuration of a bay. The dispute which caused much bitterness in the years 1866-70, was settled for the time by the Washington Treaty of 1871, and revived after the termination of that treaty, was dealt with in detail by the treaty negotiated between Mr. Chamberlain and Mr. Bayard in 1888; but that treaty failed to be ratified owing to the opposition of the Republican majority in the Senate to a treaty which had been negotiated by a democratic Government. Fortunately, after a short period of friction, the matter was adjusted amicably until revived by the action of Newfoundland, in 1905, in reopening the fishery question. A period of some tension followed, which was relieved by the overriding of Newfoundland legislation in 1907, and the arrangement for the submission to arbitration of the whole question in all its bearings as affecting both Canada and Newfoundland. The decision of that tribunal in 1910 accepted the doctrine put forward in effect by the British Government, but recommended for practical purposes the acceptance of the definition of bays which had been agreed upon between the negotiators in 1888, and this recommendation was ultimately accepted. While the decision is, in form and substance alike, only one between the United Kingdom and the United States, it is most doubtful that the position thus established can be upset by any other international proceedings, and the limit thus accorded may for legislative purposes be deemed to be the limits of the legislative authority of the Dominion and of

Newfoundland. It has also been laid down authoritatively by the Judicial Committee of the Privy Council in the case of *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*[1] that Conception Bay in Newfoundland is territorial water of that Colony, and the Parliament of Canada has asserted in the clearest terms, and so far without protest or dispute, that the whole waters of the Hudson Bay are portions of the territory of the Dominion. Parts, too, of the seas to the north of the Dominion may well be considered as appertaining to the bordering territory which is or will be Canadian.

It is right to note that a certain doubt on the whole subject of the control to be exercised over foreigners in foreign ships in British waters was cast by the *Franconia*[2] case, in which it was held, after an extraordinary deviation of legal opinion, by a majority of the court before which the question finally came, that it was not possible under the common law to punish a foreign subject for an offence, in the special case manslaughter, committed by means of a foreign ship in British territorial waters. The ground of the decision and its validity remain very doubtful, but much of its effect was done away with by the enactment of the *Territorial Waters Jurisdiction Act*, 1878, which expressly provides that an offence committed by a person whether or not a British subject on the open seas within the territorial waters of the King's dominions is an offence within the jurisdiction of the Admiral, whether committed on board or by means of a foreign ship or not, but it imposes in the case of a prosecution under this provision the condition that if the person accused is a foreign subject the consent of the Secretary of State must be obtained in the case of the United Kingdom and of the Governor in the case of proposed trial in any of the Dominions. The rule might prove an inconvenient one, and it obviously would be a distinct and annoying limitation on the autonomy of the Dominions if the Act were to be considered as applying to every proposed prosecution of foreigners for violating the

[1] 2 App. Cas. 394, 1874

[2] *R.* v. *Keyn*, 2 Ex. D. 63.

fisheries of a Dominion, but the Act has remained a dead letter in the case of the Dominions. This is due to the fact that by s. 5 of the Act it is expressly provided that nothing in the Act shall be construed to be in derogation of the rightful jurisdiction of her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament, or now by law existing in relation to foreign ships, or in relation to persons on board such ships. These words have justly been deemed to cover the jurisdiction exercised by the Dominions over foreign fishermen and others who frequent their coasts in foreign ships, for it must be remembered that the decision in the *Franconia* case is in no wise binding on the Dominion courts, who are subject only to the duty of obeying such doctrines as may be from time to time approved by the Judicial Committee of the Privy Council.

It is also important to note that the Act expressly recites in the preamble that the rightful jurisdiction of the Crown extends, and has always extended, over the open seas adjacent to the coast of the United Kingdom and of all other parts of His Majesty's dominions, to such a distance as is necessary for the defence and security of such dominions, and the definition of territorial waters given in the Act states that it means in reference to the sea such part thereof adjacent to the coast of the United Kingdom or the coast of some other part of His Majesty's Dominions as is deemed by international law to be within the territorial sovereignty of His Majesty. This definition is sufficient to cover all the cases where the ordinary three-mile limit does not apply, such as the cases of landlocked bays, which are so prominent a feature of Canada and Newfoundland. In Australia the question is different, for the bays there have seldom the configuration which makes them territorial waters, or, where they have this configuration, the narrowness of the entrances makes it clear that they are not parts of the open sea.

It has also been held that in certain cases it is possible to go further and to violate the strict letter of the provision that legislation of a Dominion must be restricted to terri-

torial limits. For many years the power of the Dominion Parliaments to pass Acts authorizing expulsion of aliens was in doubt, but this power has at last been conceded by the Privy Council, in the case of *Attorney-General of Canada v. Cain and Gilhula*,[1] which establishes the doctrine that the Parliament of Canada possesses the power to deal with aliens, and to expel them from Canada to the place whence they came, which was in that case the United States, in the same full manner in which that power is possessed by the Imperial Parliament, the power being conferred by the Imperial Constitution Act, and by the Canadian Act assented to by the Crown made under the authority of that Act. It still remains, however, undecided whether the power of Canada to deal with immigration extends to the case of British subjects being deported to the United Kingdom in a British ship, for there is at present no reported case which establishes the doctrine that the action of carrying such a passenger against his will is legal outside the territorial waters of the Dominion from which he is being expelled, and there is one case, arising out of the deportation of political prisoners from a South American republic, which suggests that the detention is not legal.[2] It seems, however, probable enough that the Privy Council would see its way to extend the doctrine regarding aliens to the case of British subjects also, and it may be that the British Courts, which are not bound by decisions of the Privy Council, would nevertheless find that, the origin of the detention being legal, the subsequent steps necessary to carry it out were also legal. The position was created by the famous incident of 1914, when under the authority of an Indemnity Act, passed *ex post facto* by the Parliament of the Union of South Africa, certain British subjects were expelled from that Dominion, and sent home on a British ship. It was proposed by those thus expelled to take proceedings against the owners of the ship by which their

[1] [1906] A. C. 542. Cf. *Robtelmes* v. *Brenan*, 4 C.L.R. 395; Keith, *Journ. Soc. Comp. Leg.*, xi. 235 7.

[2] *Reg.* v. *Lesley*, Bell C.C. 220.

transportation to the United Kingdom was carried out, but this intention has not resulted in any action.

It is clear that unless the power to deport can be legally exercised it would be impossible for the self-governing Dominions to carry out their policy of the restriction of immigrants, which in many cases is extended to the length of expelling persons who have ceased to be in any real sense immigrants because they have failed within a specified period to make themselves independent of public relief, even if this falling into poverty is the mere result of accident, and having regard to the importance attached by the Dominions to this control of immigration, it would be necessary to enlarge the powers of the Legislatures if their right to deport, as distinguished from exclusion which is conceded as clearly theirs, were seriously to be denied.

A further possibility of difficulty in the interpretation of the powers of Dominions' Legislatures from the point of view of their extension in area is that arising from the problem of the *locus* of assets of various kinds. There can, of course, be no doubt as to the power of the Imperial Parliament to impose such taxation as it thinks fit on any property whatever, wherever situated, if it can in any way bring its legislation into effective operation, but, as a Dominion cannot legislate for matters beyond the Dominion, the question arises whether it can lawfully enact a succession duty to be charged, say, upon the personal property of every kind of a deceased testator, even if he is domiciled in the province or Dominion, on the ground that the property being personal, is to be deemed to be notionally present in the province or Dominion. It is clear that the Dominion or Provincial Legislatures could not impose a tax on real property in the United Kingdom in the sense that the property could be fettered by the tax, while such a power pertains to the Parliament of the United Kingdom. In 1894, when the Finance Bill for that year was introduced into the Imperial Parliament, attention was at once called to its terms by the High Commissioner for Canada and the Agents-General of the Australian Colonies in London, who

represented to the Imperial Government that the Bill, if passed in the same form as that which it bore on introduction, would seem to impose taxation directly on property in the Colonies, which was objectionable on constitutional grounds as well as on financial grounds,[1] and accordingly as finally enacted the *Finance Act*, 1894, contained specific provision that no taxation imposed was to act as a charge on property in the Colonies. In the case of personal property Colonial Legislatures have freely assumed their power to adopt the usual rule of taxation in the case of succession duties, under which a tax is or may be levied on all property locally situated within the Dominion or State of any person in respect of the passage of the property on death, while in the case of the death of persons domiciled, the whole personal property is subjected to taxation wherever it may be situated. This assumption of power has not been questioned so far successfully in the case of any Dominion[2] or State legislation, but under the constitution of the Dominion of Canada the power of the provinces to raise direct taxation within the province has been somewhat severely limited. In the case of *Woodruff* v. *The Attorney-General for Ontario*[3] it was held that the Legis[illegible] of Ontario had no power to levy taxation on the pro[illegible] f a deceased testator, consisting of bonds and debentu[illegible]s which had been deposited by him in 1902, two years before his death, with the Mercantile Safe Deposit Company of New York, and a bank balance at New York, on the broad ground that it was not within the power of the Legislature to tax property locally situated outside the province, though, on the other hand, it has been held by the same tribunal that it is not necessary that the testator on whose death the duty is claimed should have been either domiciled or resident in the province at the time of his death, in order to authorize the taxation by the Legislature of any of his property movable or immovable situated within the province.[4] The term situation seems to

[1] See *Parl. Pap.*, C. 7433 and 7451.
[2] *Hughes* v. *Munro*, 9 C.L.R. 289.
[3] [1908] A.C. 508.
[4] *R.* v. *Lovitt*, [1912] A.C. 212.

be given a strong local sense, and it is not altogether easy to see a precise line of division which can be drawn between the case of a Dominion or State and a province in this regard.

A further striking limitation of the provincial power of legislation on the ground of locality is to be seen in the Alberta and Great Waterways Railway case, which was decided by the Privy Council in 1913.[1] In effect the issue which was presented in that case was the power of the Provincial Legislature of Alberta to deal with certain money on deposit at the Royal Bank of Canada at Edmonton, Alberta, in the special circumstances in which that money had been deposited there. It had been advanced by parties in London on the security of bonds of the Alberta and Great Waterways Railway Company, and on the authority of the head office of the Bank of Montreal it had been lodged in the Royal Bank in a special account to the credit of the Provincial Treasurer of Alberta, the whole transaction taking place on the understanding embodied in Acts of the province that the money would be paid out as the process of constructing the railway advanced. The bonds of the company were guaranteed by the province. Scarcely had the construction of the line begun than the Legislature, which viewed with dissatisfaction—apparently natural—the arrangement in question, passed an Act in which it confiscated the money to the credit of the province, repeated the guarantee, and indemnified the railway company for all claims brought against it. In pursuance of this Act the Government of Alberta sued the Bank for the sum of six million dollars, with interest, on deposit therein, while the Bank disputed the validity of the Act. The case was decided in favour of the province by the courts of first instance and of appeal in the province, the latter holding that in any event the case must be decided in favour of the province since the Legislature had undoubted power to deal with the property and civil rights within the province under s. 92 (13) of the *British North America Act*, 1867. The Judicial Committee reversed the decision of the courts

[1] [1913] A.C. 283.

below, and allowed the appeal of the Royal Bank. The argument of the decision appears to be that the aim of the Act was to alter the whole basis on which the special account had been opened, namely, the carrying out of a defined scheme: when the basis of a scheme was altered, on the strength of which money had been subscribed, it was open to those who had subscribed the money to reclaim the money from those to whom it had been subscribed. Thus in the *National Bolivian Navigation Company* v. *Wilson* [1] it had been decided by the House of Lords that when money had been subscribed on the strength of a scheme which involved a Government concession, and, when the Government concerned revoked the concession, the money advanced could be recovered from trustees in whose hands it was, on the ground that there was substantial failure of the consideration on which the advances had been made. In the case in question, an action would therefore lie against the Bank of Montreal, which was not situated in Alberta, in order to enforce the right of the lenders in London, and this right of action on the part of the lenders against the Bank of Montreal, not being a civil right within the province, could not be affected by any provincial Act. As, therefore, to give effect to the law of the province would involve depriving the Bank of Montreal of its power to meet a lawful action, the legislation of the province must be held *ultra vires*.

This is a very striking judgement, and it has been interpreted by high authority [2] as indicating that where a debt is concerned the debtor and the creditor, and all parties interested, must be in the province before the Provincial Legislature can have any power to affect the debt. If this is really the case, the power of the provinces would be gravely limited, but it seems more likely that the case must not be read as an authority for more than it seems to assert, namely, that civil rights outside the province altogether cannot be rendered nugatory by a provincial law, though even so the

[1] 5 App. Cas. 176.

[2] Lefroy, *Leading Cases in Canadian Constitutional Law*, p. 77.

limitation of provincial power is a serious one, and it is perhaps not altogether easy to reconcile this doctrine with the doctrine that property in movables owned by some one outside the province can be taxed on death by the local Legislature.[1]

It does not, however, seem that in this case, any more than in the case of succession duties, the Judicial Committee is in the slightest degree likely to extend to colonies proper the rigid limitation of authority which it has imposed on the Canadian provinces: if it were to do so, it is clear that the limitation would have to be removed by legislation.

Apart, however, from these cases it is doubtful to what extent it is really desirable or necessary to retain the limitation as regards territorial effect. Under that limitation it has been held in the case of *Macleod* v. *Attorney-General for New South Wales*[2] that it is not possible for a Colonial Legislature to punish the crime of bigamy, if the second marriage takes place outside the colony, and, though the Canadian law[3] still makes this offence a crime, and it has been acted upon, it is doubtless invalid. Now this limitation does not apply to Imperial legislation, but the Imperial Act[4] which makes it a crime to commit bigamy wherever the second marriage takes place makes no provision for the trial of an offender anywhere save in the United Kingdom, and it is not clear that such an offence is one for which procedure under the *Fugitive Offenders Act*, 1881, is available, so as to permit of the sending to England for trial of an offender of this class living in a colony. The same difficulty applies to the much more serious case of murder or manslaughter committed by a British subject outside the United Kingdom: the Imperial Act[5] makes the offence punishable, but, again, apparently only if the man is found in England, where the Act can be put in force. Exactly similar difficulties would arise if the practice of regulating by law the actions of persons abroad were freely resorted to by the Parliament of the

[1] *R.* v. *Lovitt*, [1912] A.C. 212.
[2] [1891] A.C. 455.
[3] *Revised Statutes*, 1906, c. 146, s. 307.
[4] 24 and 25 Vict. c. 100, s. 57.
[5] Ibid., s. 9.

United Kingdom as it is by some foreign powers, whose criminal law in large measure attaches to a subject wherever he may happen to be. The difficulty might be removed by the conferring of special powers of legislation in any such cases on Dominion or State Parliaments, but such limited grants of power are not very convenient.

Moreover, it must be remembered that in a sense it is possible for any Dominion or State Parliament to evade the restriction regarding territoriality by adopting a specific form of legislation. It is, indeed, not open to these Parliaments to declare an act done on the high seas illegal, but they can say that it shall be illegal for any person to enter the territorial waters of the Dominion or State, having committed such an act on the high seas. It is true that in a sense this is merely a way of evading the limitation, but the rule as we have already seen is that motives cannot be considered if the law is otherwise valid, and there is no other ground than motive on which an Act can possibly be considered invalid, because it forbids the entry into the Dominion or State of persons guilty elsewhere of a crime. The principle indeed has received the authority of the Judicial Committee, for in the case of *Peninsular and Oriental Steam Navigation Co.* v. *Kingston*,[1] it was expressly held by the Judicial Committee that it was an offence against the Customs Act of the Commonwealth for vessels to enter an Australian harbour, having broken the seals placed on excisable goods at her first port of call, although the breaking of the seals had taken place at sea. In effect, therefore, the imposition of a tax on the stores consumed at sea by the passengers, &c., of the steamer was held to be valid, although the direct taxation of the matter in question was impossible. Having regard to this fact, it is possible even for Dominion Legislatures to affect matters with which, strictly speaking, they cannot deal: thus the Legislature of Newfoundland can effectively regulate, as it has done by an Act of 1914, the prosecution of the seal fishery, though, strictly speaking, it cannot deal directly with some of the points touched upon in its legislation. The

[1] [1903] A.C. 471.

power is also available in the case of foreign ships taking part in fisheries: in their case the Imperial Parliament also has no legislative power under international law, so long as they remain outside territorial waters, but in their case also the necessity of using the harbours of the Dominions or States makes it possible to subject them to licensing laws and other enactments, as in the case of the fisheries of Queensland and Western Australia, and those of Canada and Newfoundland.

In these circumstances it must be regarded as extremely doubtful whether the retention of the territorial limitation of Dominion legislation serves any useful purpose. It certainly enables many difficult points of law to be discussed, without any obvious public advantage: thus it has been attempted in the Canadian Supreme Court to save an American fishing-vessel from the consequences of capture by a Canadian vessel when raiding the Canadian fisheries, on the ground that she was captured outside the three-mile limit, and that a Canadian vessel could not exercise coercive power beyond that limit, a plea disposed of by the court on the ground that the doctrine of hot pursuit might properly be applied in the case of Canada as well as in the case of a sovereign State.[1] It would seem, on the whole, wise to enact that the territorial limitation shall not be applicable to Dominion legislation. To some extent the limitations have been already relaxed, to some extent the conferring of full admiralty jurisdiction on Colonial courts by the *Colonial Courts of Admiralty Act*, 1890,[2] renders legislative authority less necessary, but the grant of this power would be practically convenient, and open to no substantial disadvantages.

The third great limitation on Dominion Legislatures follows inevitably from their being Legislatures for depen-

[1] *The Ship 'North' v. The King*, 37 Can. S.C.R. 385.

[2] For criminal jurisdiction see 12 and 13 Vict. *c.* 96; 23 and 24 Vict. cc. 88 and 122 (which authorize the Colonial Legislatures to punish crimes of murder, &c., when the act takes place in but death outside the Colony); 37 and 38 Vict. c. 27; 57 and 58 Vict. c. 60, ss. 685–7.

dencies. The Acts of the sovereign Legislature must be deemed by that very distinction between a dependency and the State of which a Dominion is a dependency to be superior in validity, so that, if the two Legislatures enact provisions of different character on one topic which cannot be reconciled, then inevitably the legislation of the dependency must be deemed to be of inferior validity. In the early days of Colonial history things were carried much further than this: it was considered that laws of dependencies must be assimilated as closely as possible to the laws of the mother country, England, and the hapless people of Nova Scotia, who in the innocence of their hearts enacted the excellent divorce law of Scotland in place of the unequal law of England, were compelled in observance of this fetish to replace the peccant Act, which was deemed to be invalid, by legislation based on the law of England: the case is of interest since it illustrates how an old rule can affect future development: since the passing of the *British North America Act*, 1867, the difficulty of establishing a law of divorce, in the face of the opposition of the Catholic hierarchy of Quebec, has prevented any legislation whatever on divorce being enacted by the Parliament of the Dominion, while the power to enact any law of divorce does not now belong to the Provincial Legislatures, so that amid a progressive and advanced people the defects of the old English law must still be tolerated.[1] This curious idea of repugnancy was gradually weakened by the application of common sense, but it was not until the rise of grave difficulties in South Australia, where the court took its duty of examining laws for invalidities seriously, that the matter was placed in 1865 on a perfectly clear basis by the enactment [2] that any Colonial law which is in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which the law relates, or repugnant to any law or regulation made under authority of such Act

[1] Early examples of grant of authority to deviate from English law are 6 and 7 Vict. c. 22; 22 and 23 Vict. c. 12 (as to evidence).

[2] 28 and 29 Vict. c. 63; c. 64 of the same session deals with Colonial marriages, authorizing the validity of Colonial laws as to such marriages.

of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act or order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative, while any Act not so repugnant should thus be free from suspicion of invalidity for any other ground of repugnancy. Thus there came to an end the theory that there were fundamental British principles which no Colonial law could violate, though there was no one who could possibly tell what these principles were, or what amount of divergence would amount to violation. The same Act also did away with the suggestion made from time to time that no Colonial Legislature could alter its constitution, powers, or procedure by expressly asserting the full existence of this power in the case of every representative Legislature, i.e. one of which at least one-half of the members are elective, provided that the mode of alteration prescribed by any Act of Parliament, Letters Patent, Order in Council, or Colonial Act were duly observed.

The question of constitutional alteration will receive further consideration later, but apart from that issue, which presents special difficulties, the general question can be raised whether the application of the *Colonial Laws Validity Act* to the self-governing Dominions can now be justified. The matter has not been formally in issue between the Imperial and the Dominion Governments, but the delegates who came to the United Kingdom in connexion with the passing into law of the *Commonwealth of Australia Constitution Act*, 1900, clearly intimated that in their opinion the application of that Act to the laws of great self-governing communities was out of date, and in some degree open to objection. This view was not in any degree persisted in, and the application of the *Colonial Laws Validity Act* to the Commonwealth has never been doubted by the Courts. Nor is there any doubt that the same rule applies to the Dominion of Canada. In that case a curious doctrine was quite early enunciated that the grant of exclusive legislative power to the Dominion Parliament by s. 91 of the Act in regard to the matters referred to

therein meant that in future the Imperial Parliament was not to legislate, and that the Dominion Parliament was to have power to repeal Imperial Acts covering the matter. The theory as applied to merchant shipping was refuted very effectively by Sir William Harcourt in a letter to *The Times* of June 1, 1876, which elicited a certain amount of discussion. The obvious meaning of the Act was to assign to the Dominion Parliament certain powers exclusive of the Provincial Parliaments, and the courts have long accepted this meaning of the legislation.[1]

Now in considering the question of repugnancy it must be borne in mind that repugnancy is quite a different thing according as the number of laws of the central authority affecting the dependency is great or small. It is necessary to distinguish between abolishing the doctrine of repugnancy itself and between repealing Acts which needlessly and therefore improperly fetter the action of Dominion Legislatures. It must be further taken into account that the relation of federation and state or province automatically carries with it the rule that if both Legislatures enact laws in themselves valid, and if these laws cannot be read together, the law of the lesser body must yield in validity to the law of the greater. This is the rule tacitly or expressly in the Federations and the Union, and even without express enactment it would undoubtedly be the rule in the British Empire, unless its application were in set terms to be overridden: legislation expressed to extend to a Dominion, and enacted by the Imperial Parliament, must be deemed to be superior to any Dominion legislation, if for no other than the simple reason that every Dominion constitution can have no higher foundation for its existence than an Act of Parliament. Newfoundland's constitution rests on the prerogative merely—and that therefore to deny the binding effect of an Imperial Act extending in express terms to the Dominion would be to deny the validity of the constitution itself. When the validity of the doctrine of the inability of a Dominion Legislature to repeal an Imperial Act

[1] See *Smiles* v. *Belford*, 23 Gr. 590; 1 O.A.R. 436. Cf. *Imperial Book Co.* v. *Black*, 35 Can. S.C.R. 488.

extending to the Dominion was being argued by Sir John Thompson[1] on behalf of the Canadian Government, he could not deny that an Act legislating for Canada subsequent to the *British North America Act*, by which he asserted the right to alter old Imperial Acts was given to Canada, would be valid, since it would operate as a sort of alteration of the constitution. It follows from this that even if an Imperial Act declared that the doctrine of repugnancy would not apply in future to Dominion Acts, nevertheless, if in any subsequent Imperial Act the measure were stated to apply to the Dominions, the former Act would be superseded, since it is not possible on the one hand for the Imperial Parliament to fetter its own action in any binding way, and since any Imperial Act expressed to extend to the Dominions must be regarded as valid and as overriding a Dominion Act. To repeal the *Colonial Laws Validity Act* would, therefore, merely have the result of leaving the position vague and difficult, unless all the clauses in Imperial Acts referring to the Dominions were repealed, or the Dominion Parliaments were given the power to repeal them. Even if this latter step were taken, the possibility of future legislation binding the Dominions would remain. The Act in fact is rather a charter of liberties than a fetter: it merely expresses in the irreducible form the nature of the relation between the central authority and a Dominion. The real end to be aimed at is not to abolish the form of repugnancy, but to render it innocuous by removing the material in which it takes shape.

While the relation of sovereign state and dependency seems almost necessarily to demand that the legislation of the sovereign state should overrule that of the dependency, should they unhappily chance to concur in dealing with the same point in incompatible ways, it is not at all obvious that it is necessary that the sovereign state should have a direct power of preventing the dependency legislating at all on any subject. There may be a federal system without any power of veto of legislation passed by the subordinate Legislatures:

[1] *Parl. Pap.*, C. 7783.

this is the case with the United States, and it is, as a result of the imitation of the United States model, a characteristic of the federal system of the Commonwealth of Australia. On the other hand, the power of disallowance is possessed by the central government of Canada, and naturally of course by the practically unitary central government of the Union of South Africa. In the former case the influence of the possession by the United Kingdom of the power of disallowing Canadian Acts, no doubt, was the basis on which the power of disallowing provincial Acts was taken, as appears most clearly from the terms of the *British North America Act* itself. The revolt of the confederated states of the Union had made a deep impression on the minds of Canadian statesmen, and they were determined to secure that the central authority was not so helpless *vis-à-vis* the members of the federation as the United States had proved to be.

The direct control of Dominion or State legislation possessed by the Imperial Government can be exercised in several slightly different ways. In the first place, the Governor is always part of the Dominion or State Legislature, and the Governor might in theory withhold his assent altogether from legislation passed by the two Houses, and presented to him for the necessary assent. This case is, however, in practice negligible: there is no recorded case of its use in recent years, and the high respect due to the elected Parliament of a Dominion or State makes it clear that it would be improper for a Governor, even on instructions from the Imperial Government, to withhold assent to a Bill. It is conceivable that a Governor might be advised by his ministers to withhold assent from a Bill which the two Houses had passed, purely as a technical means of reversing an error in legislation, which had gone too far to be corrected in any other way, and it has been suggested that when a Bill had been passed in a defective form through the two Houses, and it was desired to alter it, it would be better to let it thus fall to the ground, and to bring forward a new measure, but the possibility of such action remains hypothetical. On the other hand, every Governor may reserve any Bill which

is presented to him for the royal assent, and some Bills he must reserve, though a distinction is to be drawn under the *Colonial Laws Validity Act*, 1865, between the consequences of his failure to do so according as the instructions are contained in a document having the force of law, or merely in the royal instructions, the measure assented to being in the first case not brought into operation by the assent which is a mere nullity, and in the second the measure having full legal validity. The effect of reservation is to place the question of assent entirely out of the hands of the Governor: the Bill can, if it is to become law, only do so on condition that it receives by Order in Council the royal assent. Equivalent in effect to the reservation of Bill is the passage of such a Bill with the inclusion of a suspending clause providing that it shall not take effect until approved by the Crown: such a Bill can be assented to, though sometimes a suspensory clause is coupled with reservation.

The reservation of Bills in accordance with law is prescribed in certain cases of constitutional change in the Commonwealth and States of Australia, and the Union of South Africa. Reservation under royal instructions, though possible everywhere, is not prescribed in the case of the Federations and New Zealand as regards any class of Acts, special instructions being sent instead, or the ministers tendering advice in favour of reservation. In the case of the Australian States there are certain standing instructions for reservation, which include all Bills for divorce, for grants to the Governor, affecting currency, contrary to treaty obligations, Bills of an extraordinary nature affecting the prerogative or the rights of persons being British subjects not residing in the State, or the trade and shipping of the Empire, and Bills to which assent has previously been refused. But reservation is not necessary in these cases if the permission of the Secretary of State to assent has been obtained in advance, or there is a suspending clause or the matter is urgent, and the Bill is not repugnant to the law of England, nor contrary to treaty. In the case of Newfoundland, the list of 1876 adds differential duties, and the control of the Imperial Forces in

the Colony. In the case of the Union the special instruction is given to reserve any Bill which on the ground of race or colour alone excludes from the franchise in the Cape of Good Hope any person who under the law of that province as it existed in 1910 was or might become eligible as a voter for the Cape Parliament. The procedure by suspending clause is required in some Imperial Acts, e.g. as regards merchant shipping and Admiralty jurisdiction.

When the reserved Act is not assented to, or the Act containing a suspending clause is not brought into force by the signification of the royal assent, the Bill becomes null and void. The same result can be produced with regard to any Act which is passed by the disallowance of the Act by Order in Council within a period normally of two years, one in the case of the Commonwealth and the Union, the date being reckoned either from the time of the Governor's assent or from the date of receipt by the Secretary of State for the Colonies, which may be somewhat later, though the distinction, of importance in the old days of slow communication, is now of no real consequence. This form of disapproval is the worst possible: the Act having taken effect there is no possible justification for upsetting it except in the grave case of necessity, and if that necessity arises it should be possible to secure the alteration which may be required by the sending of a proper representation to the Dominion Government, and not by the use of disallowance. The existence of that formal power is sometimes suggested to be desirable on the ground that it enables the Imperial Government, in effect though not expressly, to put pressure on a Dominion Government to amend a peccant Act, since, if no amendment is made, it can be disallowed, but the existence of this power at the present day is in all probability rather a disadvantage than otherwise, and, though it is true that the power to disallow has perhaps resulted in amendments of legislation being made, it is certain that actual disallowance of laws when passed may be regarded as now obsolete in the case of responsible governments.

The question remains whether or not the power to instruct

the Governor either in special cases or generally by royal instructions to reserve Bills of certain classes if they do not contain suspending clauses is one which should longer be retained with the advance of responsible government. It is important to point out that the suggestion made that a Ministry may compel assent by resignation is not one which need be taken too seriously. The resignation of a Ministry on such an issue as the reservation of a Bill because it was deemed to affect Imperial interests might be inconvenient for the Governor, but he is always at liberty to take leave of absence with the consent of the Imperial Government, in which case he is relieved from trouble, and the officer administering the Government, now normally the Chief Justice, would not be likely to feel unduly oppressed by the difficulties of the situation. It is perfectly clear that no Dominion Parliament would allow the Ministry to remain unfilled on the theory that the Imperial Government had wrongfully insisted on the reservation of a Bill, and if, as a matter of fact, the Parliament preferred that no Government should exist rather than permit of the reservation, then it would hardly be a matter of much concern to the Imperial Government what happened in the matter of administration. The position is clearly that the Dominion enjoys full internal control subject to the occasional interference for Imperial reasons of the Imperial Government. A Ministry accepts office, subject to the constitution, which expressly provides for the part played by the Governor in legislation, and also, it may be added, for the giving of instructions to him regarding the reservation of proposed laws. Therefore, if a Ministry secure the passing of legislation by the Houses, they fulfil their duty when they ask for the royal assent, and if this is not at once accorded, then they have no constitutional right to resign office, and, it may be added, there is no constitutional obligation on the Governor to accept their resignation. There is no greater fallacy than to imagine that there is any right on the part of a public servant to resign his post when he desires: the service of the Crown is the paramount duty, and the Ministry can only

retire if their resignations are accepted. Constitutionally, a Governor can only accept the resignations when their action is constitutional, that is when he has refused to act on their advice, not on the ground of imperial instructions, but on the ground of his belief that he can obtain other ministers to support his refusal. It must be admitted that much of the confusion of thought [illegible]t is subject is simply due to the fact of the practice of Go[illegible]rs to refuse advice on the ground that the Ministry do n[illegible]epresent the views of the country or Parliament: if it ha[illegible] not been for this practice the confusion of mind which asserts the right of ministers to resign when the Governor acts on Imperial instructions would not be possible.

The argument adduced in support of this theory, when it is challenged, is that ministers must have complete responsibility for everything affecting the Dominion, or they cannot be expected to serve as ministers. This amounts simply to the doctrine that a Dominion must not be a dependency at all, that is that the whole constitution of the Empire must be changed, and the Dominions become separate and independent States, an idea perfectly open to discussion on its own merits, but wholly incompatible with responsible government in a dependency. The theory that the Imperial Government must yield is based on the error that the Imperial Government is responsible for the internal government of a responsible government Dominion, which is not the case. It is conceivable—there is no recorded instance—that in some cases a responsible government Ministry might resign over a question of reservation, and the Imperial Government might give in on the ground that the matter was not worth a dispute, a fact which would show that they had acted foolishly in allowing or ordering reservation. But in serious cases, as in that of the dispute with the United States Government over Newfoundland in 1906 the Imperial Government remained obdurate and refused to allow the *Foreign Vessels Fishing Act*, 1906,[1] to take effect, heedless of the probability of the resignation of the Government, and

[1] *Parl. Pap.*, Cd. 3262.

the impossibility of a new Ministry being constituted: and, indeed, they went so far as to override an Act of 1905, which had taken effect, by an Order in Council under the old Imperial Act of 1819 passed to secure the carrying out of the Treaty of 1818 with the United States.[1] Had the Ministry resigned, they would simply have left the Colony to arrange for the conduct of its internal government as it saw fit: for that they had no responsibility, but they had a responsibility to prevent war with a great and friendly power.

It may, of course, be further argued that the result of such a position would be the secession of the Dominion from the Empire on the one hand, or on the other the failure of the Imperial Government to give effect to its aim in preventing the operation of the legislation in question. The latter danger may be ignored: the Imperial Government in any case cannot act executively in a Dominion territory proper: it must leave the matter to be regulated by law and by the Courts: if it forbids the operation of the law as in the Newfoundland case, then the Courts will give effect to its action, and the executive government cannot override the courts. In the special case of Newfoundland where action at sea was possible, the British Navy could have secured the freedom of American vessels from illegal interference by Newfoundland executive officers, but it is fair to say that no such interference was dreamt of. On the other hand, if it is really the will of the people of a Dominion to sever themselves from the Imperial control and to set up as an independent power, it is impossible to believe that the Imperial Government would forbid the carrying out of this desire, though it would doubtless take steps to secure that the desire was a deliberate one representing the decision of a real majority, and to safeguard the interests of those who, having gone to settle in the Dominion on the faith of its British character, did not desire to remain in it under a change of régime.

Further argument is, however, needless, in view of the

[1] *Parl. Pap.*, Cd. 3262.

absence of a single instance of such a resignation, and in the presence of many cases where the refusal of assent has taken place without any resignation of Ministers, some of which have been referred to above.[1] Not to take older examples, which may be regarded as out of date, in the brief period from 1906 to 1912, the royal assent was withheld from one Bill of the Commonwealth, one of Tasmania, one of New Zealand, one of Newfoundland, two of Natal, and one of the Orange River Colony, while one Act of that Colony with a suspending clause, and one of the Transvaal were never allowed to come into operation. Even in the case of Canada, there remain two statutes on the statute book neither of which the Imperial Government has allowed to have effect, the Act to amend the Copyright Acts, passed in 1889, and the Act to provide for the marking of deck and load lines passed in 1891, both embodied in the *Revised Statutes* of 1906.

Despite, however, the theoretic defences which can be made for the retention of the power of preventing a Dominion Act having full operation, it is open to grave doubt whether the power should not formally be surrendered as being an anachronism. The presence of the power is misleading: it results in the difficulty that the Imperial Government has a power which it in theory can exercise, but which for one reason or other it cannot possibly use without creating a state of confusion which would be intolerable, as, for instance, in the case of Indemnity Acts. Yet the fact that the Imperial Government does not disallow imposes on it a responsibility which it should not have to bear, and incidentally allows of the discussion of questions affecting self-governing communities in Parliament in a manner which, while absolutely justified by the present constitutional position, is extremely annoying to these communities, who realize, in their own case at least, that the discussion of questions without full understanding is difficult and unsatisfactory in the extreme.

It may, however, be deduced from the fact that quite recently refusal of assent has been necessary, that grave Imperial injury would result from the non-retention of the

[1] Part I, chap. iv.

power to refuse assent. The answer to this is twofold: in the first place, it should always be possible in a matter really affecting Imperial interest to secure the modification of local legislation to such extent as is necessary to meet Imperial interests without the question of disallowance necessarily arising at all: of this a partial instance at least may be found in the case of the arrangements with the Union Government regarding the immigration of British Indians, which will be discussed below. In the second place, the Imperial Parliament can always, if it thinks fit, override a Colonial Act by paramount legislation, and there is much to be said for the taking of this bold course in case of absolute emergency. In the first place, it would protect the Dominion from rash interference: there is no more valuable check on hasty action than the need of satisfying Parliament of the necessity of action. In the second place, the full explanations of the case would have their effect in the Dominion, and produce a spirit of conciliation, as was the case in 1891, when the Imperial Government determined to legislate over the heads of Newfoundland, if it would not come to a reasonable settlement of the French treaty rights difficulty, with the result that Newfoundland came to terms. In the third place, it would make clear to the Empire at large the principles of policy on which the Imperial Government had acted. It is subject only to one disadvantage, though a grave one. It is only too probable that the necessity of bringing the matter before Parliament would encourage the Dominion in its resistance on the ground that the difficulty of securing Parliamentary legislation would deter the Government from pressing its views. Some force must be conceded to this argument, since it is certain that, until the sense of Imperial duty increases, matters affecting the Dominions are apt to be dealt with as matters of Party politics, as was shown by the very unsatisfactory debate in 1906 over the execution of the Natal natives, when the real constitutional position was neglected in the desire of the Opposition to attack the Government, and the no less great readiness of the Under Secretary of State to meet the Opposition with counter

attacks. But these faults of immaturity of judgement may be expected in due course to be overcome, nor can any one doubt that, had it been possible in 1907 to legislate over the heads of the Newfoundland Government, that course of action would have been preferable on constitutional grounds to the issue of an Order in Council under an Act passed thirteen years before Newfoundland had even a representative legislature.

From the theoretic grounds set out above, it seems to follow that the Imperial Parliament might well relieve Dominion and State Parliaments from the present restriction affecting the territorial limitation of Dominion legislation and might surrender the power of withholding assent to Acts now enjoyed. From the point of view of the Dominions the latter proposal might be subject to one objection: Ministries there from time to time have been glad to avail themselves of the interference of the Imperial Government as a means of getting rid of proposals which they have no liking for, but which they have not the courage to prevent their Parliaments passing into law. There have been recent instances of this, but it may suffice to refer to the frank admission of Sir Charles Tupper[1] that he and the Canadian Ministry generally were anxious to secure, and did secure, that the Canadian Bill of 1868 reducing from £10,000 to £6,000 the salary of the Governor-General should not receive the royal assent, thus behind the back of Parliament upsetting the wishes of that body: the incident is of special interest as the reduction of the salary was the cause of the failure of the proposal to appoint Lord Ma[illegible] to the office. The argument, however, cannot be seriously urged: it is compatible only with a low ideal of responsibility, and may therefore be disregarded, and it remains only by examination of the various conditions in which the Imperial control has been from time to time exercised to ascertain whether there is any serious objection to the modification of the powers of the Imperial Government, and the grant of greater freedom to the Dominions.

[1] *Recollections of Sixty Years*, p. 95.

The question, of course, presents itself whether or not it would be possible to invent a list of cases in which the Imperial power of preventing a Bill taking effect would be operative while in all other cases it would not be open to use it. In effect this would amount to determining what are Imperial and what are local topics, and such an attempt experience indicates would never be successful. If the separation could have been made it would probably have been made when the Victoria Bill, which became law in an amended form in 1855 as a schedule to an Imperial Act, was sent home for consideration, as the plan of separation was here adopted tentatively, and the question of adopting that proposed definition or of thinking out a new one presented itself. The effort to devise any successful plan of discrimination failed, though Mr. Gladstone was anxious to see it carried through. It would probably have been possible to provide some wide clause regarding the right of the Privy Council to decide in any case of doubt whether an Imperial interest or not was involved, but that would have been very confusing and complicated, and the adoption of the simpler plan of making no distinction between classes of Acts was certainly wise. The attempt would no doubt have overlooked the very Acts which in later times have given most trouble, namely, the Acts which, like the Western Australia *Factories Act*, 1904, contain wholly needless discriminations against Asiatics *eo nomine*, as well as against Chinese. The topics which troubled the statesmen of that time were more obvious questions of treaty relations, and the royal prerogative a vague term the exact force of which was uncertain.

It is of interest as indicating a difference of outlook between the relations of a federal Government to its provinces, and of the mother country to self-governing territories, to contrast the attitude of the Dominion to the Canadian provinces in the exercise of their power of legislation. The treatment of Colonial legislation has always been that it is to be aimed at to prevent any legislation which is not to take permanent effect being assented to at all, so as to cause doubt and difficulty through the disallowance, and thus the

. ules for reservation have been carefully planned and widely used. In the case of a province, on the contrary, the reservation of Bills by the Lieutenant-Governors was never at any time frequent and of late years has become almost, it may be said, obsolete. The reason for this state of affairs is that the Dominion does not object specially to interfering with the province, and has no marked dislike to allowing the working of an Act for a few months to show whether or not theoretical defects are serious in practice and rouse opposition to the measure among the people of Canada as a whole.

CHAPTER VII

INTERNAL AFFAIRS

PRIOR to the grant of responsible government the Imperial Government had been accustomed to scrutinize with the most minute care the various enactments of Colonial Legislatures. Their supervision was based in the main on no motive other than the legitimate desire to afford all possible aid to young and struggling communities in their attempts to legislate, and the skill of the United Kingdom often enabled the Government to point out defects of a serious character. With the grant of responsible government the duty of supervising internal affairs passed away from the Imperial Government, and, though it took some years for the change to become effective, before 1875 it was well established that folly in a law in the eyes of Downing Street was no possible ground for taking any exception to its terms. It must be remembered that there was temptation to intervene: private individuals who deemed that their interests were being wrongly handled by Dominion Parliaments were very ready to appeal to the Secretary of State to prevent gross injustice being done: nor indeed were their appeals always in vain, as Prince Edward Island found in its efforts to buy out the proprietors who had been established in the island, and for whose expropriation equitable terms were demanded by the Imperial Government. The most famous case of interference perhaps on record was that in 1897 in Newfoundland. The Government of Sir W. Whiteway had found themselves in 1894 in an unhappy position: the passing of an Act regarding elections had made the practices normal in Newfoundland in the case of elections illegal, and thus the Government found that its supporters were being one by one attacked by election petitions, and found to have been illegally elected. They, therefore, in fear of further

ills, passed in 1897 a Bill (c. 28) which was, however, reserved by the Governor, and never assented to, since the result of the assent would have been to condone the very serious misapplication of public funds which was normal at Newfoundland elections, and which certainly did not deserve to be encouraged.[1] But, on the other hand, the earnest attempt of a very powerful party in Newfoundland to secure the disallowance of the legislation regarding the Newfoundland railway contract,[2] though supported by strong arguments, was completely unsuccessful, Mr. Chamberlain coming to the definite opinion that the matter was one which wholly concerned the Colony, and that accordingly there was no ground for refusing to give full effect to the legislation which had been passed by the Colony. He did not, however, conceal his opinion that the handing over of all the natural sources of wealth of the Colony to one firm, however distinguished, was a mistake, and to a certain extent events justified his view. The feeling against the contract was strong, and Sir R. Bond, in deference to it, modified by another agreement with Mr. Reid the terms of the contract, securing the return to the Colony of the ownership of the railway, which, however, was still to be worked by Mr. Reid, and of the telegraph system, though only at the expense of the payment of very considerable sums of money. The case, however, is important, as it shows the impossibility of a position which leads a strong party in a Colony to seek aid against the elected Government by interference from Downing Street. So decisive was this refusal, and so clear the repudiation of any intention of the Imperial Government to intervene in the internal affairs of a Dominion, that it is a matter of surprise that cases of such application have not been unknown in quite recent times; thus, for instance, petitions for the withholding of assent were presented against a New South Wales Act, dealing with the settlement of the claims arising out of the land scandals in that State under the administration of the Lands Department by Mr. Crick, and the land taxation

[1] *Parl. Pap.*, H.C. 184, 1906, p. 4.
[2] Ibid., C. 8867 and 9137.

of the Labour Ministry in the Commonwealth in 1910. The point of exception taken to the latter legislation was that it struck at absentee owners, such as the land companies with double taxation, and that this change of taxation was unfair as these companies could not be other than absentees in the technical sense, and that there was some force in this argument was admitted by the succeeding Liberal Government though [illegible] able to give any remedy, and by the action of the [illegible] Wales Labour Government in removing the discrimination against absentees existing under the laws of that State. But jurisdiction in such matters would obviously [illegible], and it is undesirable that it should [illegible] individuals to send petitions on such questions as the *Navigation Act* of the Commonwealth to the Imperial Government, a position which merely tends to lead to friction.

Unfortunately, a difficulty arises in this connexion, because of the right[1] of a British subject to petition the Crown on any matter affecting his interests. In the case of a self-governing Dominion it is clear that as the Ministry are the responsible advisers of the Governor, who represents the Crown, the petition should really be addressed to the Governor, and disposed of by the Ministry who advise the Governor what answer is to be returned. The right to petition the Crown when acted upon places all parties in an inconvenient position. The Crown must be advised what action is to be taken by his Imperial Ministers, and for this purpose they must be advised by the Dominion Government, while the Dominion Government naturally enough dislikes being asked for reports on such matters. In the ordinary instance, however, it is simple to dispose of the petition by advising His Majesty to refer the petition to the responsible Ministry concerned through the Governor, and this course is regularly adopted in the case of applications for the exercise of the prerogative of mercy in favour of a condemned prisoner. But the case of a petition for

[1] Whether it exists by strict law may be doubted, but the question is not of importance. See 1 Will. & Mary, sess. 2, c. 2.

the disallowance of an Act of a Dominion Parliament cannot be met in this way since the responsibility of disallowing rests not with the Dominion Government but with the Imperial Government. Thus the necessity of calling for a report from the Dominion Government is created, and friction is certain to be engendered over a matter which is not of Imperial importance. It is impossible to think that it is desirable on principle to retain the present practice of petitioning the Crown if it is deemed to be desirable, and the only means of evading the present difficulty is the removal of the Imperial veto, whereupon it is easy to dispose of petitions by mere reference to the responsible ministers. The alternative suggestion that all petitioners of the Crown should be informed that their petitions will not be received if they refer to matters arising in the Dominions is open to the insuperable objection that they cut the connexion between the Crown and the subject overseas.

On the other hand, in the case of petitions for leave to sue the Crown there is nothing whatever to be said for the grave anomaly by which these petitions may be addressed to the Crown, and a fiat may be granted despite the objections of ministers. This has happened on several occasions in the case of the State of Western Australia, and there is no doubt whatever that the right of so petitioning the Crown exists in every self-governing Dominion and State, unless it has been barred effectively by statute. To this rule the only possible exception is in those cases where the basis of the law of the Dominion is not English law, as in Quebec, and the Union of South Africa. The validity of this distinction is doubtful, and rests merely on opinion, as there is no decided case which deals with it, and it is indeed a matter on which it would be difficult to obtain a legal decision, except perhaps by a special reference to the Privy Council. The point involved is whether the matter is to be treated as one of the royal prerogative, namely the right of the Crown to waive immunity to suit, or a matter of procedure introduced with the English common law. But in the great majority of cases the power need never be invoked, for while

the remedy by petition of right is one very limited in extent,[1] the Dominions and States have made much more ample and generous provision in their statutes for proceedings against the Crown, so that applications to the Crown and the responsibility of Imperial ministers can seldom be of any advantage. Moreover, the possibility of such applications could be wholly prevented by the passing of local legislation barring the right whether as part of the prerogative or a rule of procedure, and it is surprising that this course has not been adopted by Western Australia, to which the position was made clear so long ago as at the Conference of 1897. It has of course been argued that the Imperial Government ought on these occasions simply to act on the advice of the local Ministry as to the propriety of the application, but this is, as in the case of the disallowance of Acts, impossible, since the Ministry are responsible for the exercise of the power of advice, and, as the matter is one of law, they are bound to act on the same principles which guide the Ministry in the United Kingdom in advising the grant or refusal of a fiat to a petition of right. Moreover, in one case at least, ministers have special responsibility if the claim is against the Imperial Government, and not the Colonial Government: in these instances the fiat alone is the method in which proceedings can be taken, as the Dominion Acts deal with claims against the Crown in its local aspect, and not with claims against the Crown in its Imperial aspect. But this class of cases is precisely that one in which the views of the local Government are not constitutionally requisite for the guidance of the Imperial Government, though they may be valuable, and the existence of the procedure by petition of right in these cases is both proper and not open to be barred by any local Act, except in so far as the local Legislature might in theory prevent the local courts from taking cognizance of

[1] It does not refer at all to torts; see Clode, *Petition of Right*, and Robertson, *Proceedings by and against the Crown*. For New South Wales see Act No. 27 of 1912. In the Cape up to 1881 a simple action could be brought against any head of a government department with the consent of the court.

such a case or acting on the fiat. Moreover, the right to grant a fiat in this case applies to every Dominion or province.

These are comparatively trivial matters, but a good deal of feeling long existed in the Dominions in connexion with the question of marriage and divorce. The points at issue were the strong feeling in the Dominions in favour of extending the grounds of divorce, and in favour of relaxing the restriction on marriage with a deceased wife's sister. The opposition to both proposals came in part, no doubt, from episcopal feeling, but the real ground of objection was that the introduction of the changes might produce confusions of law, especially in cases of inheritance, since the English courts could not recognize the offspring of marriages with deceased wife's sisters as legitimate for purposes of intestate succession to real property or titles of honour, and would only accept as legitimate divorces those pronounced by the courts of the domicile of the husband. In the end the Dominions were permitted to legislate as they thought fit, but only after the Governments had adopted in the case of divorce the rule of domicile, save in the case of deserted wives,[1] whose husbands had changed their domicile without their consent. Moreover, in the long run the influence[2] of the Dominions produced first the passing of the Act of 1906, which made valid for every purpose within the United Kingdom a marriage with the sister of a deceased wife which took place outside the United Kingdom between persons domiciled in a place where such marriages were legal, and in the second place the passing of the Act of 1907, which made legal such marriages in the United Kingdom itself. Nor has the influence of the divorce law of the Dominions been without effect in the United Kingdom: certain of its features received endorsement from the conclusions of the majority report of the Royal Commission on the law of divorce, though the possibility of legislation in the sense of these recommendations appears to be practically nil.

[1] See *Parl. Pap.*, C. 6006. Domicile must have existed, *Brook* v. *Brook*, 13 N.S.W.R. Div. 9; *Whitehouse* v. *Whitehouse*, 21 N.S.W.L.R. Div. 16. For Western Australia see Act No. 7 of 1912. [2] *Parl. Pap.*, Cd. 2398.

But, while the efforts to control the Dominions in matters of social relations are things of the past, the conception that the Imperial Government, because it has a veto on legislation, is responsible for other internal matters is a persistent one, and its inconvenience was shown very convincingly in the case of the deportation in January 1914 of certain labour leaders from South Africa. The labour unrest of the preceding year, which had come to a head in rioting at Johannesburg, broke out again in January in the form of a general strike, and as a result the Government of the Union had recourse to martial law in several districts, called out the defence force, which by this time had been duly constituted, thus rendering the use of Imperial troops as in the preceding year unnecessary, and took every step to put down the strike. In this they were successful without bloodshed, and so far their proceedings seem to have received general approval. They, however, went further: on January 27 the Governor-General received a notification from ministers that they had decided in order to give a lesson which would be effective against treasonable and seditious practices, and to secure the peace of the Union, to deport forthwith ten specified persons, and to forbid their return to the Union. They added that they would at once ask Parliament to confirm their action. They then proceeded forcibly to send to England from Natal the men in question, frustrating efforts to invoke the assistance of the courts on their behalf.[1]

The procedure adopted was wholly illegal: the exact extent to which the actions of the Government in suppressing a dangerous position may go under the common law of South Africa is as doubtful as it is in England, and it is perfectly clear that much that was done in the case at issue might well have been perfectly legal under the maxim *salus reipublicae suprema lex*. But in the particular case in question the men were in prison powerless for evil, and their removal from the country was flagrantly illegal:[2] the justification given by General Smuts was merely that if the

[1] *Parl. Pap.*, Cd. 7213 and 7348.

[2] Cf. *Round Table*, 1914, pp. 567–81.

Government had not taken the step they would never have obtained in cold blood from Parliament the right to expel the prisoners, whose deportation then was not necessary as a deterrent but merely as a punishment. The only possibility, therefore, of legalizing the action was that of passing a Bill of Indemnity, and that step was accordingly at once taken by the Union Parliament in Act No. 1 of 1914, in which provision was made for the withdrawal of martial law from those districts in which it had been brought into operation, to indemnify the Government, its officers, and other persons in respect of acts advised, ordered, and done in good faith, for the prevention and suppression of internal disorder, and the maintenance of good order and public safety and in the administration of martial law, and to declare that the persons specified who had been deported from the Union should be liable to deportation if they again entered it.

The lawless and somewhat unwise action of the Government in deporting men who should have been tried by law was deeply disapproved by some of the best minds of South Africa, such as that of Mr. Merriman, and it raised a feeling of such indignation in the United Kingdom,[1] that from a British Dominion, on which millions of British money and lives had been spent, ten British subjects had been expelled without due process of law, whereas if they had been proved to be criminals the Governor-General would under the royal instructions have been precluded from pardoning them on condition of their being sent to England. It was realized that the passing of an Indemnity Act would preclude the men receiving justice from the Courts of the Union or the Courts of the United Kingdom, and that the plan of bringing an action against the steamship company who owned the steamer by which they had been brought home, or the captain of the steamer, was an ineffective way of proceeding to vindicate them, even if legally such an

[1] See the debate in the House of Commons, Feb. 12, 1914. Most of the organs of the press disapproved the action taken. See e.g. *Morning Post*, Jan. 31, 1914.

action were to be successful. Two complaints were therefore made against the Imperial Government: that the Governor-General should have informed the Ministry that they must not deport the men, and that the Imperial Government should intimate that the Indemnity Bill would not be allowed to come into operation if the men were not secured their legal right of testing the validity of their deportation, or, as that would have been impossible, that the Indemnity Bill should not be allowed at all to take effect.

The case was a crucial test of the doctrines of responsible government. It was pointed out that a New Zealand Indemnity Act in 1867 had been refused the royal assent, because its terms were too wide and were not limited to cover only acts done in good faith, and that a new Indemnity Act had therefore to be enacted by the Parliament, but it was not realized that there was all the difference in the world between the case of an Indemnity Act in New Zealand, when persons affected were Maoris, who were not at all likely to have recourse to the courts of the Colony for redress for acts done during the rebellion which had been put down, and when the men were British subjects of a pugnacious type, prepared to attack at once the officers of the Union in the Law Courts, which would no doubt have given them swift redress. The position in effect was that the Government had placed themselves by their hasty action in a most difficult position, from which nothing but an Indemnity Act could extricate them, but that that Act had been forthcoming with a degree of unanimity in the Parliament which speaks more effectively for the terror raised in the Union by the general strike than for the sense of liberty possessed by members of the Union Parliament. But the Act was there, the matter with which it dealt was obviously one of internal politics only, to refuse assent would be to create inextricable confusion, and to discredit a government which had certainly been faced by a grave danger, and which in the main had met that danger without needless violence. The preservation of internal order is clearly the main duty of government, and it is impossible to undertake to scrutinize

too closely its methods if the local Parliament approves them. The Imperial Government, therefore, while strictly disclaiming any intention of expressing an opinion on the propriety of the measures taken by the Government of the Union, declined to withhold assent to the Bill. But they showed their interest in the matter by pointing out during the process of the passing of the Bill that as first drafted it appeared to provide for the legislation of future action under martial law, that this course was open to the same objections as had been urged to s. 9 of the Natal *Indemnity Act*, No. 50 of 1906, and that it would appear better to restrict the Act on the model of the Transvaal Ordinance, No. 38 of 1902, to transactions of the past. The suggestion was accepted by the Government of the Union, and the Act as passed and assented to referred only to the exercise of martial law in the past.[1]

While it is impossible to deny that the action of the Imperial Government was the only possible course to be adopted in the best interest of South Africa, it is plain that their attitude was rendered possible only by the fact that the deportees were all British subjects. Had the deportees been aliens, there would undoubtedly have arisen a question of the gravest importance: no self-respecting foreign Government would have acquiesced in the expulsion of its subjects without trial, and a demand for arbitration on the point could not have been declined. This fact would at once have given the Imperial Government a direct Imperial interest in the case, and while it doubtless would not have prevented the giving of assent to the Act, that assent could only have been given on the express understanding that the Union Government was prepared to pay damages for the injuries done to the men, if an arbitration decided against them. But a further conclusion follows from this obvious fact: as matters stand the subjects of the British Crown have less effective protection from acts of illegality in self-governing Dominions than in foreign countries, for in foreign countries they have the support of the Imperial Govern-

[1] *Parl. Pap.*, Cd. 7348, p. 103.

ment, and such support cannot be effectively accorded to them in the case of ill-treatment in the oversea Dominions, since there is no mode by which the Imperial Government can prefer a demand for compensation upon a Dominion.

This fact is merely an extreme case of what is universally true, that in many matters it is less possible for the Imperial Government to bring effective pressure to bear upon the self-governing Dominions than it is to bring pressure to bear on foreign States. The latter for reasons of high policy, for good fellowship, or other consideration, are often willing to receive representations on the behalf of individuals, and if not the network of arbitration treaties permits of reference to arbitration. If a firm or individual complain of action in a Dominion, he can only be referred to the courts which in the event of the passing of Indemnity Acts may be powerless to accord relief. An excellent example of this is afforded by the famous case of the Cobalt Lake in Canada: the Government of Ontario secured the passing of a local Act which was alleged, rightly or wrongly, to cancel existing rights without compensation: an appeal was made to the Federal Government to disallow the Act, but, while the Federal Government did not deem the Act desirable or fair, it declined to disallow it on the ground that it was not the province of the Federal Government to deal with provincial Acts with regard to their intrinsic merit, but merely on grounds affecting the Dominion in some vital way. Similarly in the Alberta and Great Waterways Railway case, where the Legislature of Alberta confiscated certain moneys for the provincial revenue, though this action was modified by other portions of the same legislation, the Federal Government again asserted the position that it was not its function to judge of the propriety of measures of the provinces on grounds of morality alone.[1] In either case the company or person affected by the action of the provincial legislature could have received no compensation of any sort through the action of the Imperial Government, which, had the transaction been done in foreign

[1] *Parl. Pap.*, Cd. 6091, pp. 66, 67.

countries, could have claimed to intervene in their behalf. In the latter case, curiously enough, the Judicial Committee of the Privy Council found itself able to give relief,[1] but this was an accident pure and simple, though one not applicable to a foreign country, and in the former case the Privy Council had no such power, and refused leave to appeal from the decision of the court in Ontario affirming the validity of the act of confiscation.

The difficulty recurs in another form in the matter of the treatment of British Indians in the self-governing Dominions. In the case of the Union of South Africa, the contrast is made more emphatic because part of the Union, the part most concerned at the present day, was formerly foreign territory and the full weight of the Imperial Government was lent to the efforts to secure for Indians there a better position. In point of fact, their position since annexation has deteriorated in practice though not altogether in law, and there is no tribunal which can be invoked to settle the differences of opinion between the Imperial and the Dominion Government, nor one to which India could appeal against the action of the self-governing Dominions in treating harshly resident Indians.[2] In some cases the use of the power of veto has prevented difficulties of this type so far arising, but there may well be in the future further cases where the Imperial and the Dominion Governments differ in good faith on points which between foreign countries would be referred to arbitration for discussion and settlement.

The proposal naturally suggests itself that the Judicial Committee of the Privy Council should be used in these cases as the means of adjusting differences. It would no doubt be desirable that for this purpose the tribunal should be strengthened by a stronger admixture of the element of Dominion judges, and, if questions rather of statesmanship than mere law are to be decided, it might be better to refer the dispute by the statutory power of the Crown to a special

[1] [1913] A.C. 283.

[2] e. g. the dispute as to the deportation of alleged domiciled Indians via Lorenzo Marques; *House of Lords Debates*, July 26, 1910.

committee which might consist in part of high legal officials, and in part of statesmen, chosen from the United Kingdom and the Dominions. The possibilities of development of such a body are obvious, and the nucleus of such action is present in cases like the reference of intercolonial boundary disputes to the consideration of the Privy Council. The substantive law to be considered by such a body would be the general principles of international law as accepted by the British Empire, but doubtless they would have to evolve a good deal of law of their own, to meet the abnormal conditions of the Empire. But it would be a real advantage to have some recognized way of submitting questions to arbitration in a satisfactory manner. The decisions of the arbitral body would not be legally binding on any party, but they would, like the decisions of an arbitral tribunal at international law, doubtless be acted upon. To make the scheme effective it would, no doubt, be essential to confine its scope to definite complaints by one Dominion against another, or by the United Kingdom against a Dominion, or vice versa, of injury inflicted upon a British subject belonging to one part of the Empire in some other under circumstances, which in international law would afford a cause of claim for damages.[1] The institution of such a form of procedure would only be another recognition of the obvious fact that the position of the self-governing Dominions tends in an ever-increasing degree to be assimilated to that of foreign states, while the choice of tribunal would be a sign of the other essential fact, the real unity of the Empire.

In the particular case in question, the deportation of labour leaders from the Union, the situation in the Union changed sufficiently later on to permit the Government to reconsider its decision to keep the deportees permanently out of South Africa. The suggestion that the Governor-General would have himself intervened to prevent the action of his ministers, or should have been instructed to intervene, cannot be regarded as convincing. The Governor-General was evidently

[1] The restriction to such classes would be essential, as a body of this type could not deal with policy.

deeply convinced of the necessity of the stern enforcement of the law, as he showed in his careful statement of the situation, and probably he did not feel that the action of ministers was in its essence such as to call for his intervention, as they proposed at once to ask Parliament to ratify their acts. The Secretary of State had certainly neither the necessary time nor knowledge to interfere in the matter. But there can be no more singular example of the curious effects of the declaration of martial law than that the Governor-General should have solemnly used his power under royal warrant [1] to convene and confirm the sentences of General Courts Martial, assembled for the trial of persons subject to military law, to convene a General Court Martial to try accused persons who under the martial law regulations were declared to be subject to military law. The power granted to Lord Gladstone by the Crown was one referring to troops who become subject to the provisions of the *Army Act*,[2] and had nothing whatever to do with civilians who might be declared by invalid and illegal regulations to be subject to military law, nor could the Indemnity Act make Lord Gladstone's use of his warrant in this way anything but manifestly absurd: doubtless in the haste of the action taken, the point of the legal propriety of the measure was not considered with adequate care by the law advisers of the Government. The serious point about the action of course was that Lord Gladstone, whose power under the warrant was, strictly speaking, a personal power, not to be exercised on ministerial advice as a matter of course, was thus led to make himself personally responsible for a wholly illegal trial, which should have been carried out under martial law pure and simple, and should not have been clothed with an apparent legality to which it had no possible claim.

[1] *Parl. Paper*, Cd. 7348, pp. 200, 201.

[2] The power was given as it might be useful in cases of troops of the Imperial forces in the Union, and was therefore not a power of the Governor-General as a colonial official at all.

CHAPTER VIII

THE TREATMENT OF NATIVE RACES

THERE is no more striking example of the difficulties of the carrying out of responsible government than the constantly recurring questions which have arisen as to the right of the Imperial Government to interfere with the actions of a Dominion in respect to its treatment of native races. The problem has arisen from the fact that the growth of a large white population has often seemed to render the concession of such a form of government necessary, while at the same time the white population has not been able to rise to a really high view of its duty towards the native peoples which it must control. In the case of the Union of South Africa a still more complicated aspect has been given to the matter by the fact that by conquest two republics which set up the fundamental doctrine of the inequality of the white and the black races have been included in the Empire on terms which forbade the grant of the franchise to the native races before the establishment of representative government.

In Canada, indeed, and in Newfoundland, the question of the native races presents little enough trouble: the Boethucs of Newfoundland had disappeared before the grant of a Legislature, and the natives of Labrador present no problems for policy to deal with. In Canada the Imperial Government established in its management of the Indian tribes a record that has been worthily maintained by the Dominion Government which takes care of all the Indians throughout the Dominion, and secures their rights against any serious encroachment. The Indian settlements have been respected, and the necessary surrenders of lands from them for occupation by white settlers have been acquired

by agreements which have been faithfully kept, and in which the interests of the natives are fully considered. Indeed until quite recently the *Indian Act*[1] did not contain authority for the Government to take land compulsorily from an Indian band, and the power was only given by an Act (c. 14) of 1911 after it had been found necessary to pay quite excessive rates to remove the Songhees Indians from their reserve near Victoria, British Columbia. This Act provides that in the case of a reserve within the area of an incorporated city of not less than 8,000 inhabitants, if the Indians will not surrender their rights the Governor-in-Council may, on the recommendation of the Superintendent, refer the question to a judge of the Exchequer Court, who shall have power to decide whether the Indians should be required to surrender the reserve and the amount of compensation to be paid. The amount so awarded shall be spent in providing the Indians with a new reserve, in compensating any of those dispossessed for any houses or improvements, in transferring the Indians to the new reserve, and in establishing them there, any balance of the amount being placed to their credit. The same Act provides a more effective means of securing the recovery of possession of Indian reserves from persons encroaching upon them by means of proceedings in the Canadian courts: it also makes the annuities payable to Indian tribes a direct charge on the consolidated revenue fund of Canada, and it expressly provides that, if any reserve is taken from the Indians under the decision of a judge of the Exchequer Court, the Indians shall not be removed until a new reserve has duly been marked out for their use.

The only serious difficulty as regards the rights of the Indians to their lands which is now outstanding is that in British Columbia. The question of the precise nature of the Indian rights in the other provinces of Canada has not been definitely determined, but it is clear that the Indians are not full owners of the land, but that they enjoy the use of the land which they occupy by the benevolence of the

[1] *Revised Statutes*, 1906, c. 81. See *Parl. Paper*, Cd. 6091, p. 20.

Crown,[1] a fact which of course is for most purposes as good as a fuller title. In the case of British Columbia the claim of the Indians is that all the land of the province is theirs by law, and that they have a right to it except in so far as they have by proper means been induced to part with it. They claim that by the royal proclamation of 1763 issued by the King after the cession of Canada the native rights in land were expressly preserved, and that at no time has the Indian title to the lands been defeated. They point out that in the case of Canada the procedure of extinguishing the Indian title by agreement with the tribes has always been faithfully followed, and that the same procedure should have been adopted, but was not adopted, in British Columbia. They recognize that the Government of British Columbia has allotted certain reserves to the Indians, but they complain that these reserves are only at the rate of about twenty acres a head in place of from 160 to 180, the amount considered proper in Alberta and Saskatchewan by the Government of the Dominion, which controls the public lands of these provinces. They say that they are willing to treat with the Dominion Government for the surrender of lands, but not to allow it to be assumed that they have no right to the lands and only such a claim on the benevolence of the Crown as the provincial government may deem fit to allow.

The Government of British Columbia, on the other hand, bases, it appears, their claim to be the judges of the needs of the Indians and their denial of the Indian title on the fact that the proclamation of 1763, which had certainly been of importance in the direction adopted by the procedure in Canada, had no application to the territory of British Columbia, which was not then British territory at all and was hardly known. They also point to the terms of the agreement on the faith of which Canada was extended by the inclusion of British Columbia, and which under the *British North America Act*, 1867, have the force of an Imperial Act. It is there provided that the charge of the

[1] *St. Catherine's Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46.

Indians and the trusteeship of the lands reserved for their use and benefit shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union. To carry out this policy tracts of land of such extent as it had been the practice of the British Columbia Government to appropriate for that purpose were from time to time to be conveyed from the local government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government, and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted the matter should be referred for the decision of the Secretary of State for the Colonies.

The result of this reference to an eventual right of the Secretary of State for the Colonies has inevitably been appeals to the Secretary of State to use his influence to improve the position of the Indians. But the clause merely provides for an appeal to him in case of disagreement between the two Governments, and it is practically impossible that such an appeal should ever arise, for the simple reason that the policy of British Columbia before the union in regard to grants of land was so extremely far from generous that it is certain that the amounts of land which it has from time to time handed over as reserves exceed the amounts contemplated in the agreement, which seems to have been passed on an erroneous view of the policy of British Columbia. From the legal point of view of the Indian claim it is clear that the agreement treats the Indians as in the position of persons who have no claim on the Government of British Columbia other than that of friendly consideration, marked by the grant of reserves, and it seems that from the beginning of colonization in British Columbia that was the view taken to the land rights of the Indians: they were savages, the territorial possession of the land and the sovereignty being vested in the Crown, and not in the natives at all, a view with which may be

compared the attitude of the Hudson Bay Company towards the natives in the vast lands of which possession was given to them by the Charter of Charles II in 1673. This conception of native rights is clearly very old-fashioned, but it is difficult to deny that it was the basis of the proceedings of the British Columbia Government before union, and the Dominion Government, in their efforts to arrive at a friendly settlement of the matter with the provincial government by means of negotiation with a view to provide for the allotment of further reserves for the Indians, do not seem to have been prepared to admit that the Indian claim to the property of the soil of the province can be upheld in point of law. In any case, indeed, it must be plain that the widest form of the Indian claim, that to the ownership of the soil of the whole of the province except such parts as have been formally parted with, is absurd: it would be at most reasonable for them to argue that their possessions extended to such parts of the soil as were fully occupied by them: the mere wandering of tribes in the process of hunting over wide areas cannot form a reasonable basis of title, and in view of the British Columbia practice since the existence of the Colony and its stereotyping by the terms of union, it is difficult to see how any valid title could be made out by the Indians.[1] In Canada proper, it must be remembered, to which the King's proclamation of 1763 applied, the position merely is that the Indians have a claim to consideration from the Crown, and therefore, while the procedure by means of extinguishing the Indian title prevails, the procedure is based on consideration, not on necessity. The mere passing of the Act of 1911, to which reference was made above, is proof that the Indian title can be defeated by Dominion—but not by provincial—legislation, so that assuming even that the proclamation of 1763 can be held to have applied to British Columbia, none the less it merely gave the Indians a claim to consideration, which has been left to the Crown to deal with as it thought fit prior to union, after which the terms

[1] Cf. A. H. F. Lefroy, *Canada's Federal System*, pp. 711 14.

of its action were defined by the agreement with the Dominion.

Curiously enough, the question of the land rights of the natives in New Zealand, as a result of the annexation of the colony and the treaty made with the chiefs for the annexation, has recently formed the subject of a somewhat unexpected decision in the Supreme Court of New Zealand. In the case of *Tamihana Korokai* v. *The Solicitor-General*,[1] which came before the Court of Appeal as a special case stated under rule 245 of the Code of Civil Procedure, the question was raised as to the right of certain native tribes occupying land adjoining Lake Rotorua in the North Island to occupy exclusively certain defined portions of the lake as fishing-grounds. On the part of the Crown it was alleged that no such right existed, and that the lake was open to public fishing. No agreement had been made at any time between the Crown and the natives for the sale or cession to the Crown of the bed of the lake or any part thereof, and the natives claimed, therefore, customary title to the bed which the Crown denied. In the alternative to claiming the bed of the lake as customary native land, the natives advanced claims of freehold based on their tenure of the adjoining land, or at least to customary exclusive rights of fishing and navigation. The main question in the court was whether the mere assertion of the Solicitor-General that the bed of the lake was Crown land, free from native customary title, was conclusive on the count that no native title or right of user existed, as upon this answer depended the question what remedy the natives had for the native customary land recognized as theirs by the treaty of Waitangi, of 1840, as against the Crown, and in what manner the legal right to their land, if any, could be extinguished by the Crown.

The case made for the plaintiff expressly admitted that the seisin of all land in New Zealand was vested in the Crown, by virtue of the prerogative, but there was nothing in the claim inconsistent with that seisin. The treaty

[1] 32 N.Z.L.R. 321.

of Waitangi had ceded to the Crown the sovereignty of New Zealand and the seisin of all the land in New Zealand, but the cession was subject to the land rights enjoyed by custom by the natives, as was expressly recognized by the treaty which gave the Government alone the power to acquire lands by purchase. The mere assertion by the Solicitor-General of the right of the Crown was contrary to the whole purpose of the treaty, which evidently contemplated that rights of this kind should be subject to the courts, and to the whole machinery of the Native Land Acts which were passed to regulate the mode of ascertaining and modifying such rights. On the other hand the Solicitor-General contended that the native claim was never a legal one which could be enforced by action against the Crown: it was merely for the Crown to say if it recognized the claim. Any other procedure would throw into doubt all titles in New Zealand, since it would be open to raise questions as to whether the native claim in any individual case had been duly disposed of. It had been laid down by the court in New Zealand in the case of *Wi Parata* v. *The Bishop of Wellington*[1] that the validity of the title to land in New Zealand, once granted by the Crown, could not be called into question on the ground of the failure to extinguish the native customary title. This decision was still valid, despite the decision of the Privy Council in the case of *Nireaha Tamaki* v. *Baker*.[2] In that case the Privy Council did not decide as to the question whether the native title was available as against the Crown, but only decided that the native title was a ground upon which an action could be brought in the Supreme Court. They had decided that an action could be brought, but the decision was based on the *Native Rights Act*, 1865, s. 3, which had been repealed by the *Native Lands Act*, 1909. The native title was analogous to a possessory title, e.g. the title of an alien to land in England before the *Naturalization Acts*, and was good against all the world except the true owner. The New Zealand title was therefore analogous to that in force in the

[1] 3 N.Z.J.R. (N.S.) A.C. 72.

[2] [1901] A.C. 561.

United States and Canada. The principles there were that absolute ownership of Indian land was vested in the state subject to a possessory title in the Indians: the Government had exclusive rights of pre-emption and could grant the fee of land without the extinguishing of the native title, but the native title was not available against the Government. The two cases differed, however, in so far as the American natives were looked on as separate political communities, and under American law a treaty was part of the supreme law of the land and prevailed over statute, whereas the Treaty of Waitangi was not a treaty at all, but a contract with certain individuals, and a treaty by English constitutional law had in itself no legal effect, without legislation. The legislation of New Zealand had never made the native title legally enforceable against the Crown. In reply the plaintiff laid stress on the fact that the mere assertion of title by the Attorney-General was a mere matter of pleading, which for validity must be supported by evidence of the right of the Crown. Assuming that the customary rights of the natives rested on the favour or grace of the Crown, the Crown could not, in a constitutional country, grant Crown lands or purchase native land except by virtue of an Act of Parliament. All the judges were unanimous in the decision of the case in favour of the plaintiff.

The Chief Justice pointed out that the only question at issue was whether the assertion of the Crown that the land was Crown land concluded the matter and prevented the native land court from making any inquiries. The question arose under the Treaty of Waitangi by which a large number of chiefs ceded their sovereignty and in return received a guarantee to the chiefs and tribes, and to the families and individuals thereof, of the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties, retaining, however, an exclusive right of pre-emption. It was agreed that every part of land had a native owner, and the course of legislation had assumed that lands were vested in the Crown, and that until the Crown issued a freehold title customary titles could not be

recognized, but the Crown would give a freehold title to all, which proved that the land could not be taken or kept by the Crown unless the natives ceded their rights to it. S. 73 of the Constitution Act of 1852 recognized the native title as existing: the Act of 1862, the first Act to provide for the ascertainment of ownership of native land, contained a preamble reciting the Treaty of Waitangi. An Act was passed in 1863 for the taking of lands from natives committing rebellion or guilty of insurrection, and no doubt there had been interference by legislation with native lands, but that was based on the right of eminent domain, and was based on the same principle as the Irish Land Acts, and the Scottish Crofters statutes.

The decision in the case of *Wi Parata* had not altered that position. It only emphasized the decision in *Reg.* v. *Symonds*[1] that the Supreme Court could take no cognizance of treaty rights not embodied in statute, and could not deal with native customary title. In the case of *Nireaha Tamaki*, the Privy Council had, however, recognized that the natives had rights, under the New Zealand statute law, to their customary lands. These rights were clearly recognized in his opinion by ss. 84-89 of the *Native Land Act*, 1909, which gave exclusive jurisdiction to the native Land Court and required that court to deal with the matter in accordance with the ancient custom and usage of the Maori people. The Solicitor-General or the Attorney-General had no power to declare that land was Crown land in the absence of any statutory authority, and he must prove any plea to the contrary. The only thing that could prevent the native Land Court entering on an inquiry as to the customary title was a proclamation of the Governor under statute as provided for in s. 85 of the *Native Land Act*, 1909, or a prohibition by the Governor under s. 100 of that Act, or proof that the land had been ceded by the true owners or that a Crown grant had been issued. The formal decision of the court was therefore that the native Land Court had jurisdiction to entertain and determine a claim by natives to

[1] *Parl. Pap.*, Dec. 1847, p. 64.

ownership of land claimed by the Crown, and to determine such a claim by an order binding the Crown unless its power to do so were brought to an end by a proclamation under s. 85 of the *Native Land Act*, 1909, or some such similar statutory provision, or the Crown showed title to the land. It was for the Native Land Court to decide upon evidence whether any particular piece of land was native customary land or not, and also whether according to native custom Lake Rotorua did or did not belong in ownership to the Maoris, or whether they had merely a right to fish in the waters of the lake.

Williams J. pointed out that, even assuming that all the land in New Zealand became vested in the Crown by virtue of the prerogative and that the treaty was binding only upon the honour of the Crown, it did not follow that the Solicitor-General had any right to perform an act of sovereignty: any power he had must be derived from the Governor in the right of the Crown, and the judgements of the Privy Council in *Musgrave* v. *Pulido* [1] and *Cameron* v. *Kyte* [2] showed that even the Governor had no power to interfere to prevent the exercise of rights given to natives by the statute law of the Dominion. The treaty was one with the Sovereign of the Empire, who would normally act on the advice of his ministers in Great Britain unless the power of deciding had been expressly delegated, and no evidence of delegation to the Governor or action by the Governor under such delegation had been adduced. But in addition it was clear that the Crown by statute had parted with the power to do what was alleged and the right had been given by ss. 90–93 of the Act of 1909 under which natives were entitled to have a legal estate in fee simple, and any possession of such rights was valid against the Crown.

Edwards J. concurred that the claim of the Attorney-General or Solicitor-General could not be supported, and Cooper J. also concurred. He pointed out that the Act of 1909 expressly showed the difference between native lands

[1] 3 Knapp, 332.

[2] 5 App. Cas. 102.

and Crown lands, and that technically the legal estate in the lands was vested in His Majesty, but subject to the right of the natives to the possession and ownership of their customary lands, which they had not ceded to the King. Chapman J. concurred in the previous judgements. He pointed out that it was doubtful whether the chiefs who signed the Treaty of 1840 could be regarded as sovereign chiefs, but the matter did not appear to be of essential importance. The legislation of New Zealand had repeatedly recognized the existence of the native rights over the land, and had referred to the Native Land Court the investigation of titles to native land. The lands might be Crown lands, but they were not vacant Crown lands. To the objection that, if this were the case, there would be no means of reaching finality in land transactions, he pointed out that the express power was given by s. 85 of the Act of 1909 to declare that the native title had been extinguished and that, while it was presumed that the power would be honestly exercised, when exercised the exercise was final. As regards the claim of the Solicitor-General he pointed out that whether or not the Crown had a prerogative right the right could not be exercised by the Attorney General: evidence must be adduced of some deliberate and formal act in exercise of the prerogative. It was further doubtful whether the prerogative still existed, and whether in view of s. 85 of the Act of 1909 there now existed any other mode of putting a limit on the jurisdiction of the Native Land Court than a proclamation under that section.

The importance of the decision is obvious, inasmuch as it shows the stress laid on the fair treatment of native title in New Zealand, where a long series of Land Acts has been passed aimed at securing that the natives shall not part foolishly with their lands, and that they shall retain sufficient land to secure their reasonable subsistence. The natives recognize in the main the fairness of their treatment, and, though from time to time petitions are addressed to the Crown against the native land legislation, they have of course been powerless to effect any interference with the work

of the Legislature, which is based on a deliberate consideration of the best interests of the natives themselves. In New Zealand as in Canada the question of the grant of land in individual titles to natives has long been discussed, and opinion in New Zealand tends to approve the system if applied with due precaution.

In the case of Australia the question of the land ownership of the aborigines has never become one of the first importance, as a result of the feeble hold of the aborigines on civilization. In Tasmania the aborigines have disappeared; in New South Wales, Victoria, and South Australia[1] they are no more than a feeble and dwindling remnant under the care of a Government department, provided with doles. In Queensland, the Northern Territory, and in Western Australia they possess more vigour, and their stock-stealing habits have constantly brought them into trouble with the police. The habit of handcuffing these natives and conveying them on long journeys in this condition has been from time to time a source of protests by residents in the States, and of late a real effort to prevent their lapse into criminal habits has been made by the allotting to them of very considerable reserves and the presentation of stock. But all Imperial responsibility for them was abandoned by the Imperial Government in 1897 after a period of seven years, in which the department dealing with aborigines had been placed under the independent control of the Governor. The Colonial Government objected strongly to this restraint on the power of the Government, and the Governor for his part represented that the result of having a department shut off from ministerial responsibility was that it was isolated and could not effect much for the welfare of the natives, and accordingly though in 1894 an attempt by the Legislature to amend the Constitution Act in this respect was frustrated, in 1897 after the Colonial Conference of that year, the Imperial veto was withdrawn and the Colonial Government given full authority.[2] There is no reason

[1] Act No. 1048.

[2] *Parl. Pap.*, C. 8350. Cf. Acts No. 14 of 1905; 12 of 1911

whatever to believe that the result has been disadvantageous to the natives: the form of independent control without the reality is never worth retaining. In the Northern Territory of Australia, now under the care of the Commonwealth, but formerly controlled by South Australia, recent legislation has been passed first by the State [1] and later by the Commonwealth [2] with a view to prevent as far as possible the ill-treatment of the aborigines, whose importance for the stock farms in the country is fully recognized. In that territory, however, many of the tribes are wholly wild and not under control: their numbers are really unknown, but probably not very high, and their standard of civilization is certainly low. In Queensland, the natives are also protected by law, but the latest reports of the Protector of Aborigines reveals that there also the process of gradual extinction is going on, though the loss even economically is very far from negligible. The cause of this decline is partly no doubt heedless treatment on the part of the settlers, but probably it is more an inevitable or practically inevitable result of the contact of very inferior races with an advanced civilization.

In all the self-governing Dominions other than the Union of South Africa the native problem is one of no fundamental importance save from the point of view of local duty. In South Africa it is a question of infinite difficulty, and the most serious problem, which the country has to face, lies in the fact that the native race tends to grow more rapidly than the white race, and that this tendency must be expected to accelerate in proportion as the enforcement of the rule of peace and the efforts made to improve the conditions under which the natives live diminish the needlessly great mortality which now takes place among them. Unlike the aborigines of Australia, and even of Canada, the native of South Africa appears to be essentially hardy, though normally inferior in mental development. The problem is further complicated by the presence of a large coloured class, varying very much in admixture of blood, and of very

[1] *Parl. Pap.*, Cd. 5582, p. 33. [2] *Parl. Pap.*, Cd. 6091, p. 41.

mixed origin. This class is clearly distinguished from the white class on the one hand and the native class proper on the other, but its sympathies lie, as is natural, on the whole with the white class to which it seeks to belong, rather than with the native class from which it desires to rise. The attitude is repaid by the natives by a marked dislike in many cases, which is not shown to the white class proper. But the two classes, coloured and native, both steadily advance in civilization, and become economically more and more important. The position is illustrated in an interesting manner by the two different policies followed in the Transvaal and the Cape with regard to the coloured skilled workers: in the Cape they are accepted as members of the trade unions, and they are encouraged to throw in their lot with the white workers; in the Transvaal they are excluded, but the exclusion is the constant subject of objection. The natives, again, are anxious to attain the rank of skilled workers, and indefinite depression of their position is beyond the sphere of possibility. These facts are far more serious from the point of view of the future of the Union than the possibility at some far distant date of a native rising. The military organization of the Union, however, is under the *Defence Act*[1] based on the rigid exclusion from the duty of bearing arms of the members of the population who are not of European descent, a fact which is of importance when it is remembered that Maoris from New Zealand have been used in the European War along with the other forces of the Dominion.

The native question has been treated in different ways in the several parts of the Union and with varying success. The wise decision by which the franchise was given to natives as well as white persons by the Constitution Act of the Cape has definitely influenced the whole treatment of the natives in that province, where it has set the ideal of Cecil Rhodes of equal rights for every civilized man. Though subsequent legislation in 1887 and 1892 modified

[1] No. 13 of 1912, s. 7. Natives may be allowed to volunteer if the Government so prescribes.

the effect of the franchise, the restrictions imposed were merely in harmony with that ideal, for they reinforced the view that the civilization should be the test by requiring that the property qualification necessary for a vote should be property owned by a native personally and not as a member of tribe, and that each voter should have a slight tinge of education. The differential legislation of the Cape against natives has accordingly been directed with fairness and good sense, and the territories which are practically purely native have been governed on lines different from those of the rest of the province. In Natal, on the other hand, the franchise was practically not conceded to natives at all, for though it could be obtained on certain conditions these were so strict that they were almost never fulfilled by the native, and the attempt to mitigate the disadvantages of this position by the plan of reserving to the Governor an independent position with regard to the natives was a complete fiasco. The Governor was authorized in his capacity as supreme chief of the natives to act without regard to the advice of ministers if he saw fit, but it was neither practicable nor reasonable to expect him so to do, and he certainly did not attempt to do otherwise than as his ministers advised. It is clear that the executive government of a colony cannot be divided between two sets of hands.

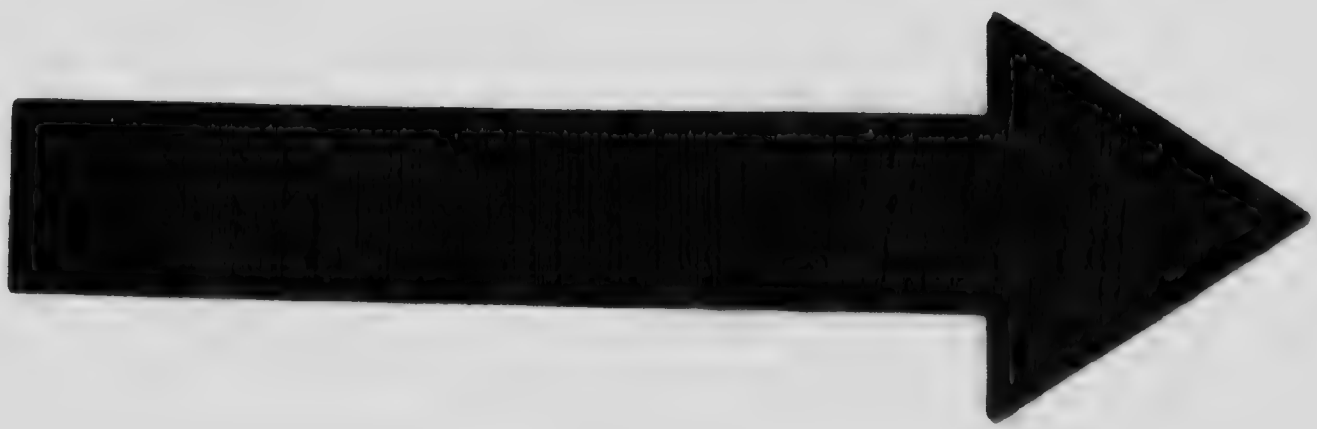
In the Transvaal and the Orange Free State the native was definitely declared to be inferior to the white in Church and State, and the Churches of these provinces deny the native the equality conceded by the Dutch Reformed Church in the Cape, insisting, even when the Churches were united in one body, after Union on providing that the union of the Churches should not confer on the Cape province native members the rights of members in the Transvaal and the Orange Free State. In revenge the movement of Ethiopianism, the native Church of South Africa, has struck strong roots in the two provinces, though the political danger feared from it seems no longer to be rated so high as it was some years ago.[1] In practice the Orange Free State was

[1] Cf. *Parl. Pap.*, Cd. 2399. For the Church Act see Act No. 23 of 1911.

more retrograde than the Transvaal, for it not merely refused to allow a native to acquire land, but shut him out from the practice of professions and skilled trades, an exclusion which persists. In both countries the pass laws by which the movements of the natives are regulated were onerous in the extreme, and there was no effective repression of ill treatment of natives by their masters. The advent of British rule was of no great advantage to the natives: it is true that there has been stricter enforcement of the personal rights of natives to freedom from assault, the notorious de Wet attributing much of his anger against the British rule to his being fined for an assault on a native, which was of course contrary to every Boer idea of propriety, and certain minor alterations were made in the way of relaxing the severity of penalties for evasions of the pass laws,[1] which still, however, remain onerous in the extreme. Other points of complaint of differential treatment are the severe penalties imposed on the illicit intercourse of natives with white women, but not vice versa, the differential administration of the law regarding assaults of black on white and vice versa, the rules which forbid natives to use sidepaths on streets, to ride inside tram cars, to travel first-class on railway lines, and similar other matters. Exemptions from the effect of the numerous disabilities imposed on natives can be obtained by specially qualified persons, but such exemptions are not very freely granted in the Transvaal and Orange Free State.

With the advent of Union one distinct diminution of the status of the natives was brought about: the Union Act not merely makes no provision for native voting in the Union generally, though it preserves the Cape native vote for the present, but it excludes from membership of the Union Parliament any native or coloured man. This is a retrograde step since the Cape Parliament was open to native or coloured members, though it was not the practice for them to be elected even by those constituencies where

[1] *Parl. Pap.*, Cd. 714 and 904.



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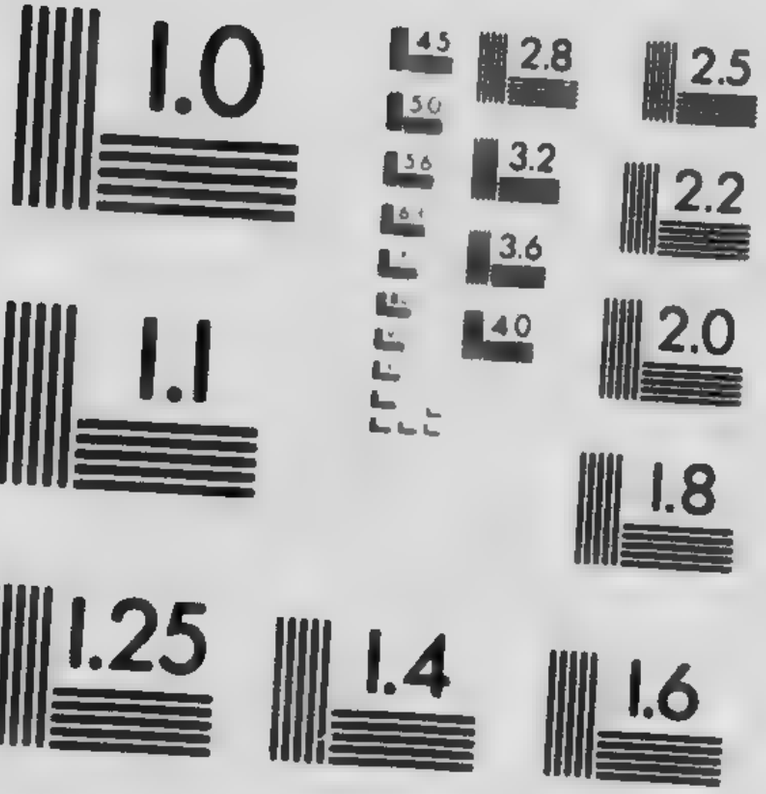

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the native vote was a factor of importance. Moreover it must be admitted that even the native vote in the Cape is less secure than it was. The vote could be taken away by the action of Parliament, but, in deference to the strong feeling in the Cape on this question, such a law must be passed by not less than two-thirds of the total number of the members of both houses at a joint sitting of the two houses, a provision which gives a certain security for the permanence of the vote. Moreover, in deference to the expression of opinion on this subject in the course of the passing of the measure through the Imperial Parliament, it was expressly provided in the royal instructions issued to the Governor-General that any Bill so passed by the requisite majority must still be reserved for the signification of the royal pleasure. But no other solution was possible: the Transvaal and the Orange Free State would not hear of the grant of the franchise, and indeed there has been, especially since the inclusion of these territories in the Empire, a steady tendency of opinion in favour of the abolition of the Cape vote for natives: thus in the report of the Native Affairs Commission[1] of 1903–5 it was recommended by a majority that in place of the vote being allowed to natives, they should have a small and defined representation in Parliament on the analogy of the Maori vote in New Zealand. It is, however, very doubtful whether, if this plan were adopted, there would be any likelihood of the grant of the New Zealand scale of representation, without which the New Zealand scheme would be wholly unsatisfactory. Moreover the New Zealand plan is effective because in effect the Maori electorates are homogeneous in a marked degree, and in most parts of South Africa it would be difficult to produce any satisfactory result of elections of representatives of natives, while if the alternative of nominee representatives were adopted the result would be still more unsatisfactory. Even in the case of the first Senate of the Union, in which there were eight Senators nominated by the Govern-

[1] *Parl. Pap.*, Cd. 2399.

ment, half of whom should be chosen for their special knowledge of native problems, one of the Senators was given the appointment because he represented Natal, and was unable to secure election to the Lower House, his knowledge of native affairs being by no means extensive or valuable.

As practically everywhere in South Africa also, the native question centres in the question of land. The Orange Free State in the period of its separate existence as a colony commenced to deal with the question in one of its aspects, the unrestricted squatting of natives of lands, which had been condemned on excellent grounds by the South African Native Affairs Commission. But the Act for this purpose (No. 42 of 1908) did not receive the royal assent, without which it could not take effect as it contained, in accordance with the instructions to the Governor, a suspending clause. The Secretary of State for the Colonies considered[1] that the matter should stand over for general action in the Union, the question being one which arose everywhere where there was a settled white population. The Union Parliament in 1913 passed an Act No. 27 to deal with this problem on the basis of segregation of the two races to a defined extent, too close contact being deemed disadvantageous for both. Under this Act a commission has been appointed to report what areas in the Union should be set apart as areas within which land may not be acquired by purchase or hire by natives, and what areas should be similarly set apart as areas in which interests may not be acquired by persons other than natives. Pending the report of the commission, no person save a native may without the special consent of the Governor-General acquire any interest in land within the native areas which are scheduled in full detail in the Act. Conversely, save with the same permission, outside the scheduled area no European can acquire interests in land from a native, nor a native from a European. The harshness of these provisions is, however, modified by the fact that existing contracts are not interfered with, and may be

[1] *Parl. Pap.*, H.C. 160, 1912, p. 3.

renewed except in the case of the Orange Free State, that any number of labour tenants may reside on a Transvaal farm, if they give not less than ninety days' work and do not pay any rent, and that in the Transvaal and Natal no native resident on a farm may be removed under the Act if he or the head of his family is duly registered under the Native Affairs Department of the Transvaal for taxation or other purposes. In the Orange Free State the position of squatters is assimilated to that of master and servants, as was at one time the case.

The principle of the Act caused much heartburning among the natives of the Union, and it was decided to petition the Imperial Government for assistance in securing more favourable terms. The burden of the representations made by the natives was that the principle of separation could not be carried further than it was already carried, that the effect of the law would be to deprive natives who had been saving money in order to acquire land of the legitimate result of their labours, that the aim of the law was to compel service by taking away the means of independence, and that the result of compulsory service at reduced wages and high rents would not be separation, but an intermingling of both races of the most injurious character. In reply the Government laid stress on the fact that in due course it was proposed gradually to improve the existing system by expropriating European owners in native areas, by settling such areas on a definite system, by encouraging the acquisition of holdings in such areas by natives, and by permitting through native councils the local administration of affairs in native areas. It was also pointed out that the decision to separate interests was deliberate, but that the utmost care had been taken to avoid unnecessary hardship to individuals. What is more important, however, is the fact that strong exception was taken to the proposal to appeal on the measure to the Imperial Government : it was pointed out to the petitioners that the matter was one which essentially concerned the Government of the Union, and that, therefore, it must be settled in South Africa, and

the somewhat undiplomatic warning was given that any other course of action would tend to prejudice the good and liberal administration of native affairs in the Union. The warning presumably was merely meant by General Botha to imply that the generosity of the Union might not be proof against annoyance caused by an appeal to the Imperial Government, as it cannot be supposed that the administration of native affairs would be allowed to be conducted badly, but in any case it failed of its effect. The Imperial Government, however, very naturally refused to intervene.[1]

While, however, the Imperial Government is clearly divested of any right to interfere in native policy in the Union, and while the right of veto on Union legislation in this regard is merely an inconvenient anomaly, the Imperial Government is still responsible for the administration of the colony of Basutoland and the protectorates of Swaziland and Bechuanaland. By a somewhat illogical procedure an attempt has been made in the schedule to the Act of Union to prescribe the form of government which is to be enjoyed by these territories when they are handed over to the Government of the Union. The scheme of government proposed is an ingenious one, based on the view that the constant change of ministers of native affairs is a grave drawback to the proper management of such affairs, that continuity in such management is essential and that it will best be produced by the giving of the control of the territories to the Prime Minister of the Union, who shall be advised by a council of non-political advisers of standing and ability: while the final control is reserved to the Prime Minister acting through the Governor-General in Council, it is contemplated that the advisory council will normally have the right to have laid before the Parliament records of the points on which they disagreed with the Prime Minister. Provision is also made for free trade and freedom of intercourse between the territories if taken over and the rest of the Union, for the prevention of the

[1] *Parl. Pap.*, Cd. 7508.

sale of intoxicants, and the preservation of native land rights.

The scheme is ingenious and the plan of handing over territories on conditions of administr tion agreed upon ha a parallel in the case of the handing over in 1896 of British Bechuanaland to the Cape Government.[1] But it is certainly open to grave doubt whether the transfer of the territories to the Union would in any way make for the benefit of the natives or of the Union. Basutoland has been preserved as a native reserve, in which the Basutos prosper and very slowly advance in civilization, and Bechuanaland is inhabited in large measure by feeble tribes who are preserved merely by the lack of contact with a rougher civilization. If the present régime is to continue, the Union would reap no special benefit from taking over the administration, while, if it is not to continue, the territories would certainly from the native point of view be the losers. The case of Swaziland is different : the folly of the rulers of the land has so divided it up amongst white and native that its merger in the Union is only a matter of time.

Should, however, it be decided to abandon Imperial control over the territories, on the mere ground that the Imperial Government has no interest in retaining that control in face of the strong desire of the Union to take it over, despite the fears of the natives, it seems to be unwise to attempt to lay down for the Union any method of governing the territories. It cannot be too clearly realized that a government should be entrusted with full power or not entrusted with any power at all, since it will prove in practice quite impossible to maintain the restrictions which it is desired to impose. The elaborate provisions of the schedule will not be upheld if the Union Government dislike them, and, that being so, it seems that it would have been wiser to leave them alone. It is indeed open to argue that the constitution there laid down is a good one, which will be necessarily tried by the Union, and may be adhered to, but, on the other hand, must be set the fact that any constitutional form imposed

[1] *Parl. Pap.*, C. 7962.

from above is necessarily unpopular and suspect, and that in any case the circumstances when the actual transfer is made are very likely to render the schedule valueless. But the fundamental error lies in seeking to surrender control to responsible government, and yet to make conditions of the exercise of that control.

CHAPTER IX

COLOURED IMMIGRATION

No problem of the present day presents more serious difficulties than the question of the immigration of coloured races into the self-governing Dominions. The cause of the difficulty lies in the fundamentally different aspects from which the people of the United Kingdom and of the Dominions must view the question, and the resulting inability to make full allowance for the attitude of the other party to the controversy. The inhabitant of the United Kingdom sees the oriental immigrant in the form of students seeking knowledge of law, or medicine, or business, and of European culture: he hardly ever comes across any representatives of the lower classes, unless it be an occasional lascar seaman: the inhabitant of a Dominion rarely comes in contact with an Indian of superior education or rank, and sees either the Indian of the pedlar and petty trader species or the agriculturist, who has been introduced under indenture, or is descended from such an immigrant. Moreover, it must be admitted that a certain lack of culture and good breeding on the part of the average inhabitant of a Dominion renders him incapable of appreciating the fact that oriental civilization, however different from that of Europe, is not therefore inferior *eo facto*, and that it is ludicrous to classify, as mentally he often does, every kind of man of colour as a coolie. Unfortunately the existence of this ignorance and prejudice on the part of the people of the Dominions diminishes the possibility of their learning to know better the people of the East, since it is not to be expected that men of high rank, princes, who in Europe will be treated with distinction at every court, will visit countries where they will certainly, if they obtain entrance at all, find hardly any one who understands their true position.

At the same time it is fair to remember that this attitude of contempt in the case of Australia and New Zealand covers a considerable amount of uneasiness, especially in connexion with the development of the Empire of Japan, which manifested itself in the almost ludicrous affection of the greeting shown in both Dominions to the fleet of the United States on its famous voyage of intimidation to Japan. The fear of China, which was so marked a feature of the end of the second last decade of the nineteenth century, has in the twentieth developed into a much more rational fear of Japanese expansion, a fear which has spread to Western Canada, though hardly yet in the East, and to the Pacific coast of the United States. This fear has doubtless encouraged the feeling of objection to the entry even of coloured British subjects, and has intensified the devotion to the ideal of white Australia. Nor is it in the slightest degree remarkable that this ideal should be held with increasing vigour as time goes on, for the fact is patent that nothing but the rigorous exclusion policy which is now followed would have any effect in preserving Australia for the European race. Nor is it, again, possible to deny that the exclusion is based on racial grounds, pure and simple. It is, of course, common to assert that the objection to oriental labour is that it is cheap, and that it brings down the wages of European workers, and lowers their stan[illegible]ing, or that it defies the laws of sanitation, and [illegible]isease. But both these things apply to many of th[illegible]ss foreign emigrants like the Lithuanians and Galicia[illegible]o have for many years been welcomed into their land by Canadians, despite the aberrations of the Dukhobors, whom an ordinary judgement would put down as very undesirable aliens,[1] and there has been no determination to exclude these nations wholesale on the ground of nationality alone. Nor is it obvious from any standpoint of morality that it is fair to blame a worker if he demands less wages when his subsistence, owing to his temperate habits and his abstention from beef and beer, costs

[1] Cf. *Parl. Pap.*, Cd. 7507, pp. 56, 57; Mitchell, *Western Canada before the War*, pp. 11, 12, 133 sq.

him far less than his European rival. But these considerations do not invalidate the view that as it is clear that Indian and Japanese workers would speedily oust British workers on an equal field of competition in such climates as those of Australia, and as they are dangerous competitors even in Canada, the European workers are entitled, in obedience to the law of self-preservation, and the desire to perpetuate the type, to secure that they shall be left in free occupation of the territory they have. This fact, of course, means that Australia and New Zealand must hold firmly to the Imperial connexion, since otherwise they could have not the slightest chance of remaining in possession of land which they have not the men to keep, and which they cannot hope adequately to people for many years to come, especially as the birth-rate in both countries is regrettably low for newly settled lands.

The difficulty has of course been enhanced in recent years by the growing national consciousness of India, and by the power of India to express her feeling through the elective members on her legislatures. The position is at once rendered more easy and more difficult for the Imperial Government. It has, on the one hand, the consciousness that it is supported not merely by vague theories but by local public opinion, while on the other it suffers in India the grave charge of being unwilling to remedy the unfair treatment meted out to British Indians in the self-governing Dominions. There is no more cogent reason than this for pressing for the representation of India at the next Imperial Conference: it is desirable on every ground that the statesmen of the Dominions should learn direct from those who can express for India the feelings of India on this point. Nor, indeed, would it be a bad lesson for Dominion statesmen to meet as equals in a great assembly of the Empire the representatives of a race whom they are accustomed to regard as undesirable immigrants.

The difficulty of oriental immigration seemed to be disposed of for a time by the adoption, on the suggestion of Mr. Chamberlain and with the concurrence of the Government of

India and of the Government of Japan,[1] of the device of exclusion of oriental migration by means of a language test. Thus the Acts of New South Wales, South Australia, Tasmania, and New Zealand, which were passed in 1896 but not allowed to come into operation, were superseded after the Colonial Conference of 1897,[2] when Mr. Chamberlain enforced the principle of adopting the Natal Act as a model, by legislation which left the exclusion to be carried out by the device of a language test, and the Cape of Good Hope adopted this principle also in 1903. Nor has the principle been without value: for some years it certainly sufficed well enough for the purpose it sought to attain, but there are abundant signs that it is falling into disrepute, and that the exclusion is being felt bitterly by those against whom it was directed.

The case of Canada has presented recently special features of its own, thanks to the desire of the Dominion to take advantage of the terms of the treaty with Japan. The acceptance of this measure necessitated the free entry of Japanese into Canada, and the accidental circumstance of events in Hawaii, which encouraged an exodus of Japanese thence, produced a serious crisis in the Dominion, culminating in riots in British Columbia in 1907.[3] This episode brought the question of oriental immigration to a head, and it was decided, after a careful investigation of the whole question by the Dominion Government, to seek an understanding with Japan, which was happily brought about, with the aid of the British representative at To[illegible] by Mr. Lemieux and Sir Joseph Pope. The result of [illegible] arrangement was to secure the entry to Canada of every Japanese immigrant who came with a passport in proper form from the Japanese Government, while that Government gave a pledge that the total number of passports issued to persons going to settle in Canada for the first time should be confined to a definite number a year—the figure being unofficially put at 400 annually. The arrangement has worked satisfactorily, and has been

[1] See Commonwealth *Parl. Pap.*, No. 41 of 1901.
[2] *Parl. Pap.*, C. 8596.
[3] *Parl. Pap.*, Cd. 4118.

continued in force under the new position created by the termination of the old treaty with Japan and the substitution of the Treaty of April 3, 1911, which was accepted[1] by Canada on May 1, 1913, with the express addition that the acceptance of the treaty should not affect the operation of the Canadian Immigration Act. The settlement is so far satisfactory to both countries: Japan has no desire to see carried out an unlimited emigration to the Dominion, while, on the other hand, it is not prepared to find its subjects denied entrance into any country if that country is to be in close commercial relations with the Empire. In the case of Australia the disadvantages of exposure to the higher Japanese tariff have to be accepted as a penalty for refusing a similar arrangement, and this fact is, as reported by the Trade Commissioner of New South Wales in the Far East, a grave disadvantage to trade. Even this limitation is not satisfactory to all Canadians: the Legislature of British Columbia has repeatedly attempted to exclude, either directly or by the passing of a language test, the entry of all Japanese whatever, but these efforts have both been unsuccessful, for the Dominion Government has disallowed the Acts, and the Supreme Court of British Columbia pronounced invalid the Immigration Act of 1908, based on the language test, on the ground that it ran counter to the Dominion Act (c. 50 of 1907) bringing into force the treaty with Japan, and censured the action of the Provincial Legislature as being a breach of federal obligation.[2] The Federal Government have also successfully intervened to prevent the enactment by the Legislature of measures vetoing the employment of Japanese and other orientals on public works and similar enterprises, but they have allowed to remain in operation legislation depriving Japanese and other orientals of the vote, and this legislation has been pronounced valid by the Supreme Court of British Columbia and the Judicial Committee of the Privy Council.

The position of the British Indian is rendered the more

[1] For the *modus vivendi* of 1911–13 see Cd. 5734.

[2] *In re Nakane and Okazake*, 13 B.C. 370.

difficult in comparison with that of the Japanese, because of the impossibility of the adoption by the Indian Government of any system of restraint of emigration to Canada on the same lines as that adopted by the Government of Japan. The result has been that, especially since the economic set-back in Western Canada, which has been marked in the last two years, the Canadian Government has been determined to prevent the entry of any British Indians at all into the Dominion on its western side. This plan has been carried out by the adoption of rules which in effect but not in form discriminate against Indians and other orientals. In the first place a rule was made that no person could be allowed to enter Canada who did not come in by a continuous journey from the place of origin whence he migrated, and on a through ticket purchased in advance: that rule evidently rendered it impossible for any one to enter Canada from India in the absence of any direct passenger steamship connexion. Further, it was laid down that immigrants of Asiatic race must possess in their own right not less than two hundred dollars apiece, but from this rule were excepted natives of countries as to which special arrangements were in force, like Japan, or as to whom special statutory provision was made, such as Chinese, who are admitted on a payment of five hundred dollars a head as an immigration fee, intended, but not altogether successfully, to prevent Chinese immigration. Finally, to settle the matter definitely, it was ordered that no immigrant of the artisan or skilled or unskilled labourer class should be admitted to British Columbia for periods defined in the orders, but in effect continuous.[1] The ground for the passing of these orders was expressly specified as the lack of employment in British Columbia, and there is abundant evidence to prove that there was such unemployment and that the immigration of any kind of workers—there was no racial discrimination of any kind in the orders—was to be deprecated. Even the earlier order regarding the possession of two hundred dollars by an Asiatic immigrant was only a more

[1] See for the causes leading to these orders the debate in the Canadian House of Commons, March 2, 1914.

severe form of a rule applied to all immigrants, and was based upon the undoubted fact that an Asiatic immigrant, often unable to speak English, required more money in his possession than a British immigrant. Further, the money was not required to be deposited or paid to the Canadian Government: the emigrant had only to prove that he had the sum.

The result of the prohibition was the famous voyage of the *Komagata Maru* from Hong Kong with a miscellaneous body of Indians collected, many of them no doubt under false pretences, but others collected with revolutionary intent. The Indians in Canada were under the influence of the revolutionary section of the Indians in the United States, and in the minds of these revolutionaries was concerted the device of the voyage of the vessel, with the idea either of compelling the Canadian Government to permit their entry, or in the alternative of intensifying indignation in India. The vessel duly arrived, the law courts were invoked, but of course, in view of the clear requirements of the law, in vain, in favour of the Indians, save a few who, being domiciled in Canada, were allowed entry, and after an effort to defy the law, the Canadian Government, which, it should be recorded, behaved with dignity and restraint, reprovisioned the vessel, and sent it away on its return voyage. The subsequent history of the revolutionary members of its passengers is well known, and Canada could not help feeling that her wisdom in repressing the entry of Indians was amply justified by the event. The same feeling was intensified by a series of murders of anti-revolutionaries by the revolutionary section, and in particular the brutal murder in open court of Mr. Hopkinson, who, on behalf of the Dominion and Indian Governments, had been engaged in the attempt to protect the peaceful Indians from the revolutionary section of the populace.

On the other hand it is to be admitted that the settlers in British Columbia had some real ground of grievance.[1] Apart from the general question of the entry of Indians, which must

[1] *Round Table*, 1914, pp. 330–4.

be decided by the fundamental principle that a community in the interest of its own preservation must protect its individuality, there was the fact that these immigrants, many of them Sikhs, soldiers of the Crown, had entered Canada in good faith without let or hindrance, had made good in the country, and desired that they should be rejoined by their wives and children. The difficulty felt on this head after the adoption by the Government of Sir Wilfrid Laurier of the policy of restriction after the riots in British Columbia led to the sending of a delegation to the Minister of the Interior in the new Ministry of Mr. Borden, and feeling was made more bitter by the assertion that Mr. Rogers then promised the deputation to relax the restrictions, and afterwards failed to keep his promise. It is clear from the express denial of any such promise ever having been made, which Mr. Rogers issued, that there was misunderstanding, and it is probable enough that the allegation of bad faith which was spread widely over India was a deliberate invention of the revolutionary section of the Indian population. In point of fact the Government saw their way in a couple of individual cases to relax the rigour of the law against the entry of the wives of the immigrants, but the whole question had not been settled by the time of the outbreak of the war, when the gallantry of the Indian soldiers produced a feeling in the country that there must be some effort made to relax the stringency of the rules without endangering in any substantial way the racial purity of the country.

Apart from the question of entry, and the attempts, mainly unsuccessful, of British Columbia to hamper the operations of Indian and Japanese settlers, the Dominion has been free from any substantial amount of differential legislation. Some annoyance was caused both in India and in Japan in 1912 by the enactment in the province of Saskatchewan of an Act[1] which provided that no person should employ in any capacity any white woman or girl, or permit any white woman or girl to reside or lodge in, or to work in, or, save as customer in a public apartment, to frequent any restaurant,

[1] *Parl. Pap.*, Cd. 6863, p. 37 (c. 17 of 1912).

laundry, or other place of business or amusement owned, kept, or managed by any Japanese, Chinaman, or other oriental person. The strictness of this law was such that the most distinguished Japanese or Indian firm could not have employed a typist, and the form of legislation was obviously as offensive as its intention was doubtless good. As a result, both Japanese and Chinese restaurant-keepers had to dismiss their white employés, a result which was naturally represented by them as being devised by their white rivals in business as a mode of interfering with their trade. Fortunately these considerations appealed to the Dominion and Provincial Governments, and in due course the Act was amended by one passed in 1913 to omit all reference to Japanese and other orientals, and to restrict the operation of the measure to Chinamen, who are throughout the Dominions treated as being in an inferior position to any other oriental peoples. A similar Act of Manitoba passed in 1913 (c. 19) has not been made operative.[1]

The Commonwealth of Australia shuts its doors firmly on all entry of British Indians and Japanese, though it has done so merely by a language test, and it has very sensibly thought out a procedure in which provision is made for the grant of temporary permits of entry to Indian students and persons of similarly high education. Even these persons, however, cannot settle as of right in the Commonwealth, nor would, in fact, permission for them to remain there be accorded. Nor can even a domiciled oriental succeed in obtaining permission for his children, if they have not legally acquired as residents a domicile in the Commonwealth, to stay in the country ; the Commonwealth Government persisted in one case in expelling the wife of a Chinese citizen of standing and long residence whom he had married in China and who had been allowed to enter the Commonwealth for a period, though a strong agitation was got up by more moderate persons in the Commonwealth against the absurdity of insisting on her departure with her child. In these cases there is no doubt much room to see an exaggerated

[1] *Parl. Pap.*, Cd. 7507, p. 25.

spirit of exclusion, while on the other hand the very rigorous provisions taken to prevent the smuggling in of Chinese immigrants were doubtless necessary and cannot be regarded as too drastic in view of the established examples of cleverness of Chinese in evading the letter of the law.[1] The position of captains of steamers with Chinese crews is, however, rendered very difficult : they have no adequate means of preventing them deserting in many cases, and when such desertion takes place the imposition of a fine of £100[2] for each deserter may be unjust, though in practice the Commonwealth Government has on several occasions remitted penalties thus imposed if satisfied of the bona fides of the captain. On the other hand, it is impossible not to consider as undesirable and needless in the long run the tendency which is showed to restrict the rights of the resident orientals to exercise trades freely and in other ways to expose them to disabilities. The composition of the Australian population is a matter of the highest importance from any point of view, but the oppression in minor ways of persons lawfully resident is unworthy of a great people, and every now and then the fact receives some recognition, as, for instance, by the Parliament of Western Australia rejecting in 1910 a Bill which was introduced for the purpose of forbidding marriages between Europeans and orientals. The Commonwealth Old Age Pension Act[3] excludes Asiatics, but not those born in Australia, a very sound principle, and it does not penalize a woman for marrying a man who is excluded from the old age pension on that ground. The most serious feature of the present day is the tendency of the Parliament of Queensland to extend beyond the sphere of immigration which is covered by Commonwealth legislation the principle of the exclusion of Asiatics from employment because they cannot pass a language test. It is not a case of the mere passing of a factory Act, or, as in the case of Western Australia, a mines Act requiring that the employés should have

[1] See Act No. 38 of 1912.

[2] Or even £200, if a previous offence has occurred.

[3] No. 17 of 1908.

a knowledge of the English language: such a rule has obvious advantages and may well be treated as of importance for the safety of those employed in the mines. But when it is provided in an Act regarding the manufacture of margarine[1] that no person who, not being of European descent or an aboriginal native of Australia, has not obtained in the prescribed manner a certificate that he is able to read and write from dictation not less than fifty words in the English language shall be employed in any factory licensed under the Act, and, when it is remembered that the language test when applied in Australia is not a test to examine knowledge but a courteous mode of exclusion, it is perfectly obvious that the possibility of a few orientals being employed on work on which an aboriginal may be employed is a singularly absurd example of jealousy of orientals. The existence of legislation hampering Chinese in the control of their business stands in a different position, because it is true that Chinese are very difficult to supervise in matters like the observation of factory Acts, and the treatment of Chinese has long been left to the care of the Dominions.

The differences between the Imperial and the Commonwealth Governments as to the treatment of British Indians has been confined in essence to the question of lascars on British ships,[2] and the British Government severed its connexion with the Commonwealth Government in the mail service rather than accept the view that the giving of a mail contract to ships which employed lascars must be forbidden, though of course they did not contest the right of the Commonwealth to provide by law that no contract for the carriage of mails in which the Commonwealth was concerned should be given to such ships. The effect of the passing of the *Navigation Act*, 1913, of the Commonwealth into operation, when it is brought into effect, will be to make it practically impossible to employ lascars in the

[1] Act No. 9 of 1910; cf. No. 18 of 1904. But contra *Parl. Deb.*, 1912, pp. 2092–7; Western Australia *Parl. Deb.*, 1912, pp. 2642 sq.; New South Wales *Parl. Deb.*, 1912, p. 567.

[2] *Parl. Pap.*, Cd. 1639.

coasting trade, which includes any trade done between Commonwealth ports by oversea vessels, since the requirements of the Commonwealth laws regarding conditions of space are such as to be impossible of convenient application to lascar crews. More serious, however, is the fact that the Royal Commission of the Commonwealth on the pearl fishery is anxious to see the participation of Japanese in that trade brought to an end by replacing the Japanese with Australian divers and excluding them from the waters of Australia, a recommendation which has not so far been acted upon.[1] But by joint action of the Commonwealth and Queensland the sugar-growing trade has been closed to Asiatics, with compensation for vested rights.[2]

In the case of New Zealand, while immigration has been prohibited in large measure by the use of the language test in the Immigration Act, in 1913 there was a good deal of agitation on the ground that natives in considerable numbers had succeeded in entering the country from Fiji, despite the protection of the Act. The same feeling had manifested itself earlier, in 1910, when the effort of the shipping interests succeeded in obtaining the passing of a Bill[3] which provided for penalizing vessels which carried lascars as part of their crew, and which traded from New Zealand to Australia, by imposing on the passenger tickets and freight charges made in respect of passengers and goods carried by them a duty of 25 per cent. *ad valorem*, unless the vessels complied with New Zealand conditions of coastal shipping as regards the wages and treatment of the crew. The Bill was reserved for the signification of the royal pleasure and was not assented to, after it had been discussed at the Imperial Conference of 1911 on general grounds. The measure was open to serious objections as regards its proposed operation, from the point of view of constitutional law, but it was more directly objectionable by its attempt to drive lascars

[1] *Parl. Pap.*, Cd. 7507, p. 66.

[2] Queensland Act No. 4 of 1913; Commonwealth Nos. 25 and 26 of 1912; Cd. 6863, p. 113.

[3] *Parl. Pap.*, C. 5582, p. 178.

out of the shipping trade. Had the proposal been made by a foreign power, it is clear that the British Government would have been entitled to protest and to retaliate, and therefore it was not less open to objection when the persons aimed at were British subjects and the Dominion concerned a British Dominion. The force of the position taken up by the Imperial Government seems to have been recognized in the Dominion, where the failure of the Bill to receive the royal assent has not been taken very seriously. More objectionable even is the suggestion in 1913 that the immigration legislation should be strengthened by legislation affecting Asiatic *eo nomine*, but though promised in Parliament such legislation has not been passed, and, in view of the fact that complete exclusion is effected in the Commonwealth without discrimination *eo nomine*, the need for any such measure cannot be asserted.

But the real crux of the Indian problem lies in the Union of South Africa.[1] In that case the aim of the Government and the people cannot be racial purity nor the danger of the introduction of natives of an inferior race, for the South African negroes are far inferior to the British Indian in all regards, and indeed many of the Europeans who oppose their successes as traders so bitterly are really Jews of very low and undesirable class, who do not know English, and who therefore only obtain entry into the country because Yiddish, for purposes of the Immigration Act, is classed as a European language. In this case the only ground for the exclusion of the British Indian must be merely that the appalling difficulties arising from the colour question in the Union must not needlessly be added to by the creation of a further difficulty in the shape of a large resident British Indian population. The position of the Imperial Government is, however, rendered the more difficult, since before the Boer War the ill-treatment of the British Indians formed a subject of severe remonstrance to the Boer Government at Pretoria, and as high an authority as Lord Lansdowne

[1] The *Round Table*, 1914 pp. 351-64 has a good article, written from the South African point of view.

expressed the view that the treatment of the British Indians was the worst of the crimes of the Transvaal Republic. The irony of fate resulted in the failure of Lord Milner, as Governor of the Transvaal after the war, to remedy even one of the grievances which the Indians had, while the administration of the laws with the strictness of the new régime, as contrasted with the laxity of the old, made the position of the Indians a good deal less favourable than it had been before the war. To crown all, Lord Milner actually suggested the passing of legislation which would have made the conditions for the Indians much worse than before, but happily Mr. Lyttelton declined to accede to this discreditable suggestion.[1] It is, indeed, impossible to resist the conclusion that either the protests made before the war with the approval and aid of the High Commissioner, Lord Milner, were unjustified, or that the policy of leaving these wrongs unredressed after the war was unjustifiable.

For the period after the war the Crown Colony administration kept the British Indians effectively out of the country by the use of its wide powers under the *Peace Preservation Ordinance*, 1902, and one of the first acts of the responsible Government of the Transvaal after it had been appointed and met Parliament, was to pass an immigration Act, No. 15 of 1907, which absolutely excluded the entry into the Transvaal of any Indian who was not already domiciled there. This legislation was accompanied by an Act, No. 2 of 1907, which compelled registration of all Indians, a rule which was declared to be necessary to prevent evasion of the Immigration Act but which was bitterly resented by the Indian community and marked the beginning of a grave struggle between the Indians, who adopted a passive-resistance policy, and the Government.[2] Out of the necessary incidents of the struggle further grievances arose: Mohammedan prisoners confined for breaches of the law were refused any consideration in respect of observing

[1] *Parl. Pap.*, Cd. 2239.

[2] *Parl. Pap.*, Cd. 3887. Act No. 15 of 1907 was amended and made more severe by No. 36 of 1908.

religious festivals, such as the Fast of Ramazan, and Hindus were compelled to do tasks degrading them in caste. The Transvaal Government pleaded that the miscellaneous population of the jails prevented discrimination, but the Indian Government pointed out that in India with a more miscellaneous population in the prisons it was found unnecessary to compel prisoners to add religious degradation to civil punishment. Moreover, one device adopted in the summer of 1909 by the Transvaal Government, the putting of British Indians outside the borders of the Transvaal into Portuguese territory, whereupon the Portuguese officials promptly deported them to India, was bitterly resented as an improper use of a foreign government as a pawn in the game of oppressing British subjects. The situation was aggravated by the persistent attempts of Natal, in 1908, to limit further the rights of Indians in that colony. Natal has attained prosperity through the work of her Indian immigrants, and her determined attempts to exploit these people by forcing them out of the country when they ceased to be under indenture cannot be regarded with anything except dissatisfaction. The first effort was that made in 1895, when an annual licence fee of £3 was imposed on every Indian of whatever age or sex who was not reindentured, and it was imposed simply for the purpose of securing the departure of the Indians after indenture. In 1897 there followed a policy of leaving the dealing with the renewal of the grant of trading licences in the hands of the municipalities, on which the British Indians were not represented. The parliamentary franchise was also, in 1896, taken away from Indians on the ground that they belonged to a race who had not the franchise in their native country. In 1905 the further proposal was made to remove the municipal franchise *totidem verbis*, and to rank Indians with uncivilized people generally, but this Bill was not assented to by the Crown, and in 1911 a further effort to exclude the Indians from the franchise failed. In 1908 two further efforts were made to deal with the matter: in the first place it was proposed that no further licences for trading purposes should

be issued to Indians after the end of the year, and in the second, that all licences held by Indians should cease to have effect after ten years from the end of the year: neither Bill, however, was allowed to become law. It was also complained that by excluding all Indian children from secondary schools they were deprived of any chance of higher education. In the Cape there was little to complain of under the generally reasonable control of the Cape Government and the non-differential treatment of Indians, but minor points were made[1] with regard to the hardship imposed on Indians who wished to visit India, and who were only allowed one year of absence without forfeiting their right to return, the practical discrimination practised in municipalities in regard to granting trading licences, and the fees charged for certificates permitting temporary visits to other parts of the Union.[2] In the case of the Orange Free State, the complete exclusion[3] of Indians was resented, but that fact prevented any other grievances, such as the forbidding to hold land or trade, being of much consequence.[4] The land question was of importance in the Transvaal. All ownership was prohibited by a law of the South African Republic, bitterly protested against by the British Government, but deliberately acquiesced in by both Liberal and Conservative Ministries, and it was possible to compel Indians to live for sanitary reasons in locations, but they were pronounced by the Supreme Court of the Transvaal free to trade outside locations. Minor grievances related to the regulations putting British Indians on a par with natives regarding the use of trams, sidewalks, railways, &c.

The Imperial Government, strengthened by the growing indignation of India and by the effect produced throughout

[1] *Parl. Pap.*, Cd. 6283, pp. 7, 12. The right to regulate trade licences was conceded to the provinces by Act No. 10 of 1913, but their power to remove any appeal against a refusal to the Supreme Court was negatived, in order to avoid injury to Natal Indians.

[2] *Parl. Pap.*, Cd. 6283, pp. 5, 6.

[3] Law No. 18 of 1899; Ordinance No. 25 of 1902.

[4] *Law Book*, ch. xxxiii.

the Empire by the disastrous differences of opinion between the Indians and the Government, which exhibited a position fatal to any cohesion or Imperial unity, made a determined effort to induce the new Union Government—to which the control of matters differentially affecting Indians passed, under s. 147 of the *South Africa Act*, 1909, on the formation of a united South Africa—to take up in a new spirit the whole question and reach a reasonable solution. They indicated in a dispatch of October 7, 1910,[1] that the solution of the difficulties should not be of insuperable difficulty, having regard to the expressed wish of the leaders of the Indian community to arrive at a settlement based on the repeal of the Act of 1907 of the Transvaal, which discriminated directly against Indians, and by the enactment in its place of legislation based on the language test principle, it being understood that, while as a rule the test would be administered in a differential manner, nevertheless the Government would admit a limited number of educated Indians every year with a view to the meeting of the spiritual and other needs of the Indian community. The Imperial Government also expressed the hope that it would be found possible to make South Africa a single unit for immigration purposes. It was further urged that some steps should be taken to meet the grievances in Natal, and satisfaction was expressed that it had been found possible, by giving an appeal in the case of the refusal of the renewal of existing licences, to mitigate the complaint of unfair treatment in Natal in the matter of the withholding of such licences. It was also intimated that the Government of India had decided from July 1, 1911, not to allow further emigration under indenture to Natal, on the ground that it appeared that the Government of Natal was not prepared to accept the immigrants as a permanent element in the population, and that temporary emigration was considered undesirable in the interest of the emigrants themselves.

The Union Government met the proposals of the Imperial Government in a spirit of compromise: it consented to

[1] *Parl. Pap.*, Cd. 5579.

introduce a Bill based on a language test, namely, dictation in a European language, at the request of the immigration officer, and expressed their willingness to admit some educated Indians every year. But they declined to allow free migration among the different parts of the Union. There were no Indians in the Orange Free State, and was most undesirable that either there or in the Transvaal it should be possible for the large population of Natal to penetrate. On the other hand, the Government were anxious to mitigate as far as practicable the objectionable parts of the Registration Act of the Transvaal, by abandoning the demand for the prints of all the fingers in every case, and by asking no finger-prints at all in the case of an Indian who could write well. As a result of this attitude, in April 1911 [1] a stop was put for a time to the passive-resistance movement, but in 1912 it was not found possible to carry out the proposed legislation. Further progress to an understanding was made in the course of a visit by Mr. Gokhale to the Union, and at the beginning of 1913 the legislation was at last ready for introduction into the Union Parliament, where the Government pressed it forward after receiving most urgent representations from the Imperial Government to the effect that it was of Imperial importance that the legislation should be passed, without further postponement, to alter the extremely unsatisfactory position of the Indians.[2] The Act was assented to on June 14, and came into effect on August 1, but it did not effect the settlement desired. On the contrary, not only did Mr. Gandhi take exception to certain of its provisions, but popular feeling was much excited by the case of one Kulsan Bibi, who was pronounced by the Court [3] not to be eligible for entry into the Union, though she was the wife of a person domiciled therein. The Act—which contained provision for a stringent language test in the form of ability to read and write any European language, including Yiddish,[4] to the satisfaction of an

[1] *Parl. Pap.*, Cd. 6283, pp. 3, 4.

[2] *Parl. Pap.*, Cd. 6940.

[3] *Parl. Pap.*, Cd. 7111, pp. 39, 40.

[4] Yiddish as European was introduced by the Cape Act No. 30 of 1907

immigration officer, or, on appeal, an immigration board, and which also empowered the Minister to exclude any person or class of persons considered by him, on economic grounds or on account of standard or habits of life, unsuited for the Union or any province- permitted the entry of the wife and children under 16 years of age of any person who was lawfully domiciled in any province, including the wife and child of a lawful and monogamous marriage duly celebrated according to the rites of any religious faith outside the Union. There is no doubt that this clause was intended to permit the entry of wives of Indians who in fact were monogamous, but it was held that in law no Indian marriage could be deemed monogamous if by the religious faith of the Indian in question he could have more than one wife without illegality. It was felt that the Government, in taking the case of Kulsan Bibi to the courts, was deliberately defeating the intention of the Act, and at the same time a grievance which had not been dealt with in the Immigration Act came to a head. Mr. Gandhi had expected the repeal of the £3 tax imposed in Natal on Indians who did not reindenture, and he believed, as most of the Indians in Natal believed, apparently with good reason, that a promise of this repeal had been in effect made to Mr. Gokhale on the occasion of his South African visit. At the instigation of Mr. Gandhi, a passive-resistance campaign was begun in Natal, which in October ended in serious rioting with loss of life to the Indians. The situation was serious; the riots were put down very firmly, and Messrs. Gandhi, Pollak and Kallenbach, the leaders of the movement, put in prison; but the Government of the Union recognized that the situation did no credit to the Union, and that some more effective steps were necessary. They decided accordingly to submit the examination of the cause of the riots to the judgement of a judicial commission, and appointed accordingly such a commission. To some extent the purpose of the Commission was foiled, as the leaders of the Indians, for reasons which are now of secondary importance, declined to accept the constitution of the Commission as satisfactory, and

withheld all evidence, leaving it impossible for the Commission to investigate the stories of oppression of native Indians which had been freely spread over India. But on the subject of Indian grievances which led to the strike, the Commission were able to arrive at very definite results.

The Commission dispelled the erroneous impression which had prevailed that the effect of the Act of 1913 was in any way to weaken the position of the Indians in Natal who after indentures settled in the country: it had been suggested that these Indians might under the definition of domicile in the new Act be liable to be regarded as not domiciled in the Union or entitled to remain there, and after three years to acquire the right to leave the country and return as domiciled persons. They also laid stress on the fact that the provisions regarding the Orange Free State merely preserved the *status quo* under which the State was closed to Indian immigration of a permanent character, while educated Indians could be permitted to enter on the understanding that during their stay they must not engage in trade or farming. But they definitely recommended that the difficulties of the marriage question should be dealt with by legislation. In the first place, they considered that it was necessary to permit the entry of the wife and minor children of a union which was in fact monogamous, though the man might have power to marry more wives than one under the law of his religion. In the second place, they urged that in the case of a certain limited number of old residents of South Africa, who had more than one wife, these wives might be allowed to leave South Africa and travel to India and to return again so long as their husband was resident in the country. In the third place, they recommended that the law should be altered to provide a means by which natives of India could be married before a marriage officer, who might be a priest of their religion, that marriage having the effect of a monogamous marriage. Fourthly, they recognized the right of Indians who had *de facto* but one wife to have their marriages registered *ex post facto*, on the understanding that thus they had in law

the effect of monogamous marriages. The question of recognizing polygamy, which was pressed upon the Commission by the representatives of the Mohammedans in the Union, was negatived on the ground that the country was monogamous, and that it could not be expected to alter its fundamental view of marriage, but they expressly stated that they did not see any reason to penalize such a man if he subsequently performed a religious marriage, while, however, such a marriage could not be allowed to have any effect in law. They also examined in detail the complaints which had been made that the Act in effect diminished the rights as to migration into the Cape of Good Hope of natives of other provinces of the Union. Prior to the passing of the Act of 1913, it was open to any British-Indian in South Africa to enter at pleasure the Cape, but the Act of 1913 restricted the right to those who could pass the examination test as laid down by the Cape Act No. 30 of 1906, which required the writing of an application in a European language. Though it seems clear that the change of law was a deviation from the agreement made between the Government and Mr. Gandhi in 1911, they concluded that the grievance was in fact negligible, as the migration to the Cape was very small, and the examination test one which any Indian educated in the schools of the provinces could easily pass. They further examined large numbers of minor representations as to the working of the *Immigration Act*, and suggested remedies for difficulties: the chief of these were the advice that identification certificates given to persons leaving the Union for temporary purpose should be allowed three years' validity instead of one, that greater rapidity should be introduced in dealing with applications for permits for certificates, that greater facilities should be given for temporary visits to other provinces, and minor matters. They also recommended that, in order to avoid the loss of time and money entailed on women and children coming to South Africa only to find themselves rejected as prohibited immigrants, officers of the Indian Government should be empowered to examine cases in which women

and children claimed to be the wives and children of persons domiciled in the Union, and that these persons who were provided with certificates of their identity by such officers should be admitted without question.

The Commission also explained at great length the question of the £3 tax in Natal imposed under Act No. 17 of 1895 [1] on all indentured Indians coming to the Colony after the date of the coming into operation of the Act, who declined to reindenture or to leave the Colony, and under Act No. 3 of 1903 on all their children after attaining the age of 16 for boys and 13 for girls who did not indenture themselves or leave the Colony. They pointed out that, whatever the doubt might be as to the understanding of the condition by the natives who indentured, it was well understood by the Indian Government, and that it might be argued that the tax was defensible in the case of the immigrants themselves as a matter of contract. But they declined to settle the matter on narrow grounds, and examining the arguments adduced in favour of the tax they found that in point of fact it did not secure the reindenturing of many of the immigrants, and that it did not induce many to leave for India. On the other hand, it was most difficult to collect, and it encouraged vagrancy and roused ill-feeling. Moreover, it was wholly inequitable to apply it to children, and it even appeared that in 1895 it was not the intention to apply it to women at all, nor did any one doubt that it was improper to apply it : indeed, in 1910 the Natal Government had given power to exempt women on grounds of age and other causes, and in 1913 the Union Government introduced, but failed to carry through Parliament, a Bill to exempt them altogether.[2] On all these grounds, therefore, the Commission decided to recommend the repeal of the Act *in toto* as regards this point.

The report [3] of the Commission was happily accepted by the Government and by the British Indians as affording an honourable ground of a settlement, and the sobering

[1] *Parl. Pap.*, Cd. 7111, pp. 75, 76. [2] Ibid., Cd. 6940, pp. 30, 31.
[3] Ibid., Cd. 7265.

effect in the country of the outbreak of rioting in Natal contributed to render Parliament amenable to consider the question dispassionately. It was recognized that the activity of the Government in suppressing the riots showed that they were not afraid of the British-Indian population, while their willingness to accept the findings of the Judicial Commission told in favour of their moderation. Accordingly, Act No. 22 of 1914[1] was therefore passed to amend the Act of 1913 in so far as changes were necessary to secure the aim of the Government. It provides for the appointment of priests of any Indian religion as marriage officers, with power to solemnize the marriage of Indians in accordance with the rites of that religion, such marriages to have the usual results of other legal marriages, and due registers of such marriages to be kept. It also provides for the validation by registration of marriages which are *de facto* monogamous, such registration to be followed by all the results of a monogamous marriage. It further authorizes the introduction into the Union of the wife and children of any domiciled person, notwithstanding that the religious law of that person would allow him to have several wives at one time, but subject to the condition that there is no person within the Union to whom he is united in such a religious marriage, and that he has no offspring in the Union by a woman still living. It is thus rendered legal for an Indian who does not wish to have his marriage treated as monogamic still to bring freely into the Union and to take out of the Union, without losing the right to bring back there, one wife and her children. The Act also repeals entirely the provisions regarding the licence fee of £3 in Natal, and forbids the taking of proceedings for arrears accumulated before the repeal. The measure was received with lively satisfaction by the Imperial Government as terminating the movement of passive resistance and promising well for the settlement by agreement of future difficulties.

Some of these difficulties are alluded to in the report of the Commission. Into most of them they felt that they

[1] *Parl. Pap.*, Cd. 7644.

had no power to inquire, as they could not be held to have stood in causal relation to the riots, as for example the prohibition in the Transvaal of landholding by Indians, and their exclusion from the acquisition of rights under the Gold Law, the insertion by the Government of the Transvaal in grants and leases of land in townships of clauses forbidding transfer or leasing to Asiatics,[1] the alleged want of proper educational facilities for Asiatics, the prohibition to carry arms, their exclusion from the inside of trams in the Transvaal, and so forth. They did, however, examine the question of the grievances regarding the issue and renewal of dealers' licences in the Cape and in Natal.[2] In the former case they found that the City Council of Cape Town in effect refused the necessary recommendation for the grant of new licences to Indians, or the transfer of an existing licence from one Indian to another, but allowed annual renewals without question. In the Natal boroughs the grant of licences to Indians was restricted in the main to those carrying on their work in Indian quarters, while renewals were not, as in the Cape, granted as a matter of course, but might be refused, in which case, however, an appeal was allowed to the Supreme Court. Outside the townships and boroughs in Natal there was no complaint, the matter being in the hands of a Government licensing officer, who acted with perfect impartiality. While recognizing the difficulties to be faced by the Indians in the case of the Cape municipality and the boroughs and townships of Natal, the Commission felt that it would not be practicable to interfere with the municipal control of the matter.

[1] See *Parl. Pap.*, Cd. 6087, as to the position of British-Indians under the Gold Law, and the Townships Amendment Act.

[2] *Parl. Pap.*, Cd. 7265, pp. 38, 39.

CHAPTER X

MERCHANT SHIPPING

THE rule by which the legislation of a Dominion is restricted within strict territorial limits carries with it the consequence that all legislation by a Dominion for the control of shipping must *a priori* be invalid whenever a ship proceeds beyond the limits of territorial waters. It would therefore follow that all legislation for merchant shipping to be effective would require to be Imperial, and in point of fact the Imperial Legislature long controlled merchant shipping in a very minute degree. But as early as 1854 legislation was passed allowing Colonial Parliaments to regulate the shipping registered in the Colonies, and in 1869 power was given to these Parliaments to deal with the coasting trade, but subject to certain conditions. As re enacted in s. 735 of the *Merchant Shipping Act*, 1894, the Legislature of any British possession may by any Act confirmed by His Majesty repeal wholly or in part any provisions of the Act (other than those in Part III regarding emigrant ships) relating to ships registered in that possession, but such an Act cannot take effect until the approval of His Majesty has been proclaimed in the possession. By s. 736 the power to regulate the coasting trade is given, but any Act must contain a suspending clause, must treat all British ships alike, and must respect any treaty rights granted to foreign ships before May 13, 1869, and any renewal of these rights. The wording of neither clause is free from obscurity, but it may be assumed that the clauses are sufficient to allow the Legislature to make laws which bind the ships concerned while on the high seas.

In the earlier days of the self-government of the Dominions few questions arose out of merchant shipping: the Colonies were not then in any way anxious for more rigid rules than those enforced in the United Kingdom, though a dispute of

an energetic kind developed itself with the Government of the Dominion of Canada over the question of load lines, the Canadian Government contesting that as regards registered vessels the Dominion Parliament could alter the Imperial standards of load line, and that a vessel marked in accordance with the Dominion standard was entitled to enter ports of the United Kingdom free from question, although it did not comply with the Imperial rules, while the Imperial Government replied that this contention ignored the fact that specific provision [1] was made as to load lines which clearly negatived the idea that the power to repeal applied to these rules in such a way as to render the new rules made by the Dominion Parliament valid in ports of the United Kingdom: neither party would give way, and the Act [2] still remains on the Canadian statute book, but is not in operation. The position, however, has undergone a very considerable change since the growth of Australia and New Zealand, and the rise of their advanced legislation regarding the privileges of labour. In 1903 New Zealand enacted a new shipping code, which went in many respects beyond the Imperial Act, and applied much of its legislation to ships other than registered ships and the coasting trade,[3] and a Royal Commission in the Commonwealth in 1904 [4] made recommendations for legislation in much the same sense. The New Zealand Act was assented to in 1905, but with a clear intimation that much of it might be held to be *ultra vires*, and as the result of prolonged correspondence it was decided to convene in 1907 in London a Navigation Conference, at which the Imperial Government and the Governments of Australia and New Zealand were represented and there were present representatives of the shipping interests of the three countries.[5] The result of the prolonged discussions which ensued was to lay down the rule that the vessels to which Australian and New Zealand conditions should be applied

[1] 57 and 58 Vict. c. 60, s. 444.
[2] C. 40 of 1891. Cf. *Parl. Pap.*, C. 6239.
[3] *Parl. Pap.*, Cd. 2483.
[4] Ibid., Cd. 3023.
[5] Ibid., Cd. 3567.

were vessels which were registered in these Dominions while trading therein, and all vessels while engaged in the coasting trade, including vessels from oversea which took up passengers or cargo at one port of a Dominion for delivery in another, with a saving for the case where passengers or cargo were landed at one port to be taken to their destination by another steamer.

The result of this Conference in the case of New Zealand was the passing in 1909 of a Bill [1] which was reserved for the signification of the royal pleasure and assented to in 1911, under which the operation of the earlier Act was limited to such vessels as were deemed to be within the power of the Legislature in the terms of the agreement of 1907. The only point of importance which arose in the discussion was that concerning the claim of the New Zealand Parliament to regulate the rules of interpretation of bills of lading entered into in England for the carriage of goods to New Zealand, and this claim was withdrawn in 1911 by an amending Act.[2] But in 1910 difficulty arose over the Bill then passed requiring that seamen employed on ships trading to the Cook Islands or to Australia should be entitled to receive the same rate of wages as was current in New Zealand, while if this condition were not complied with a duty of twenty-five per cent. should be levied on the amount paid for passages or freight from New Zealand. The Bill raised questions of importance as regards the differentiation against Asiatics,[3] and on that ground was never assented to, but it also raised serious difficulties apart from that consideration.

In the case of the Commonwealth difficulties arose which had not made their appearance in the case of the Dominion. The first of these arose from the fact that the *Constitution Act* of the Commonwealth dates from 1900, whereas the *Merchant Shipping Act* was passed in 1894. On the strength of this fact the Commonwealth Government put forward the claim that the power to deal with navigation given by

[1] No. 36 of 1909; Cd. 5135, pp. 73–83.

[2] No. 37 of 1911; Cd. 6091, pp. 84, 85; *New Zealand Shipping Co.* v. *Tyree*, 31 N.Z.L.R. 825.

[3] Above, Chapter IX.

the Constitution was a paramount power, which enabled it to legislate without regard to the restrictions of the Act of 1894, and even to repeal the provisions of that Act in its application to the Commonwealth. The obvious reply to this contention was that the Constitution merely dealt with the distribution of powers between the States and the Commonwealth, and that there was no possibility of attributing to it the sense that it emancipated the Commonwealth from the effect of the Imperial Act of 1894. Finally, indeed, the Commonwealth Government acquiesced in this view: the Bill as formally passed by the Parliament in 1912 was reserved for the signification of the royal pleasure, and contained the necessary suspending clause. In the second place, the *Commonwealth of Australia Constitution Act*, following the precedent of the old Act of 1885 constituting the Federal Council of Australasia, gives to the laws of the Commonwealth a wider effect than is possessed by the ordinary laws of the Dominions, for it expressly provides that the laws of the Commonwealth shall be in force on all British ships, the King's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth. The exact meaning of this provision is far from being clear, but it has twice been considered by the courts of the Commonwealth, and the definite sense which seems to belong to it is to give the laws of the Commonwealth effect on these ships which commence in Australia a round voyage which brings them back to Australia, after absence from Australian waters. The obvious nature of such a round voyage is that of a voyage from the Commonwealth to the islands of the Pacific and New Zealand, and this was the case in the more important of the two cases decided in the High Court of the Commonwealth. A dispute arose between the *Merchant Service Guild of Australasia* v. *The Commonwealth Steamship Owners' Association*,[1] over the wages and conditions of service of the master and officers of a steamship, *The Fiona*, belonging to the Colonial Sugar Refining Company. The ship was registered in Sydney, and was

[1] 16 C.L.R. 664.

used to make voyages to Fiji and Auckland without any regular itinerary: the essence of its business was, however, to take stores, &c., from Sydney or Auckland to Fiji, and to carry sugar from Fiji to Auckland, whence it returned to Sidney either in ballast or with sugar on board. Another vessel of the Company in question traded from Melbourne to Ocean Island, and the points brought before the High Court was whether there was thus in existence a dispute which extended beyond the limits of one State, and therefore a matter which could be dealt with by the Commonwealth Court of Conciliation and Arbitration. If this question were to be answered in the affirmative, two further questions arose: if the Court of Conciliation and Arbitration should see fit to impose duties to be observed on board ships outside Australian waters, could the conditions be enforced by penalty whether by virtue of the *Commonwealth Constitution Act* or otherwise, and if this question were to be answered in the affirmative, could the Court, in default of an amicable settlement, compulsorily prescribe terms which were to be deemed to be inserted in agreements of services made by the respondents with members of the claimant's organization?

The case was first argued before the High Court in March 1912, when the members of the Court were equally divided in opinion. It was therefore reargued before five justices in March 1913, when it was impossible to secure a decision, as the *Judiciary Act*, passed in 1912 (No. 31), required that the decision on a constitutional point should not be given by less than a majority of the total number of justices of the Court, that is four. It was therefore reargued a third time with a definite result. For the claimants it was contended that the case was covered by s. 5 of the *Commonwealth Constitution Act*, which clearly contemplated this class of case, and that the requisite was merely that there should be a single voyage, while the port of destination could not be determined by the mere customs clearance, but must be decided by the intention at the outset of the voyage. Apart from s. 5, in the interpretation of which they had the support of the

Commonwealth Government, which as usual intervened in the case because of its interest in the interpretation of the powers of the Commonwealth Parliament, it was contended that the power of conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of one State given by s. 51 (xxxv) of the Constitution implied that where necessary for its effective enforcement the Parliament had powers of extra-territorial legislation. The respondents, on the other hand, contended that the power in s. 5 merely referred to cases of simple voyage from one port in Australia to another, a contention which had been put forward by the delegates to the Imperial Parliament from the Colonies before federation, when they defended the clause from the doubts of the Imperial Government, and that the power under the Constitution, s. 51, was confined to real Australian disputes; there could be no industrial dispute simply because a company employed coloured seamen all over the world, and the white seamen in Sydney and Melbourne were to claim that coloured labour should not be employed.

The Court was divided in opinion. The Acting Chief Justice, Sir E. Barton, adhered to the view which had been expressed by the delegates to the Imperial Parliament on the occasion of the passing of the *Constitution Act*. He held that the clause applied merely to coasting ships, that the port of destination was that named in the ship's entry outwards, and her port of clearance that whence she started her voyage, thus restricting the extension of the term in the closest sense to the coasting trade. Still less did he hold that there could be any industrial dispute in respect of things happening outside Australia. Isaacs J. dismissed the argument from the necessary implication of s. 51 (xxxv), on the ground that it was a confusion between the fact that when a power was given there was necessarily given the subsidiary authority required to make the power effective, and the failure of a power when fully exercised to attain all the results at which it was desired to arrive. In the former case the power to expel aliens had been held by the Privy Council to authorize the deportation of aliens beyond the limits of the Dominion,

but in this case the position was that despite the full exercise of the power the result desired was not achieved, and there was no authority for the view that the Act could be pressed to yield the power. On the contrary, the Act when considered carefully gave no such authority, and must be held in the absence of a quite express ground to be subject to the general territorial limitation of Dominion legislative power, which followed from the distinction between a sovereign state and a dependency. Otherwise it would be difficult to avoid conflict of legislation. It was not sufficient to argue that the dispute existed on Australian territory: it must be a dispute about the carrying on of an Australian industry: a dispute about wages to be paid in England would not fall within the meaning of the power given by s. 51, and indeed any other result would be absurd, for it would result that by engaging temporarily in trade with Australia all foreign shipowners would become subject to Australian jurisdiction for acts done on the high seas. But in his opinion s. 5 of the *Constitution Act* did deal with ships engaged in round voyages, and was not confined to the coasting trade, nor could the destination be limited to the destination shown in the ship's papers. He considered that the judgement of O'Connor J. in *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Proprietary Ltd.*[1] Already before the formation of the Commonwealth the legislation of New South Wales (42 Vict. No. 19) contained references to the intercolonial and South Sea Islands trade as being on the same footing. His answer, therefore, to the first question was that by virtue of the covering section 5 of the Constitution a dispute was not less a dispute extending beyond the limits of any one State, merely because some of the operations in respect of which the dispute existed were performed extra-territorially. The second question he felt inclined to answer, but as the majority of the Court held otherwise he left it unanswered. The third question he answered to the effect that the Court had power to require that any of the terms and conditions which it decided

[1] 5 C.L.R. 737. Cf. on the whole subject Keith, *Journ. Soc. Comp. Leg.*, ix. 202 sq.

should be in operation should be incorporated in written agreements. Higgins J. agreed with Isaacs J. in his answer to question one, this being the only point on which four justices among those by whom the case was heard agreed. He also held the same view as to the meaning of s. 5, but he did not argue the matter at length as the majority of the Court declined to answer question two, as to the power of the Court to impose duties enforceable by penalty on vessels outside Australia. He agreed with the answer to the third question as given by Isaacs J. Gavan-Duffy and Rich JJ. held that the Court of Conciliation and Arbitration had power to control the parties to a dispute even as regards conduct in places beyond territorial limits. The Imperial Parliament might assume the right to bind British subjects or even foreigners without the territorial limits of Great Britain, and might confer the same right on any subordinate Legislature, and British Courts would recognize legislation to this effect. They were inclined to think that the power to settle disputes necessarily implied a power to prescribe terms and conditions for labour to be performed outside the territorial limits, but in any case the covering section 5 of the *Constitution Act* enabled the Court to settle the dispute by imposing obligations with respect to duties to be performed on British ships engaged on voyages coming within the terms of that section, though they did not desire to express a judicial opinion on that subject. They held that they were not at liberty to answer the second question, and the answer to the third question was they thought that the power in question was clearly *intra vires*. The answer of the Court therefore was confined to the first and third questions, and was to the effect that a dispute was not less a dispute beyond the limits of any one state, merely because some of the operations in respect of which the dispute existed were performed beyond the territorial limits of the Commonwealth, and that the Court had power to require that any of the terms and conditions, which it lawfully determined should be in operation between the organization and the respondents to the plaint, should be incorporated in a written agreement between them.

The total effect of this judgement is clearly that in the case of round voyages the Commonwealth has power to regulate conditions of employment of masters and seamen, and the Commonwealth *Navigation Act*, No. 4 of 1913, agrees with the judgement in including such ships in its purview. The power thus possessed goes, it must be admitted, a good deal further than that possessed by any other Dominion, and the question of its compatibility with the power possessed or claimed by the New Zealand Parliament and courts is open to doubt. In two cases [1] decided in the Supreme Court of New Zealand, the doctrine has been laid down that it lies with the Parliament of New Zealand to control the rates of wages and similar points in respect not only of ships registered in New Zealand and trading from New Zealand to Australia and the Pacific, but also in the case of vessels registered in Australia though subject to the rules laid down by an award of the Commonwealth Court of Arbitration, and complying with these rules, so that these vessels while engaged in the coasting trade of New Zealand shall be obliged to pay the rates of wages provided for in New Zealand. The validity of this provision would appear to be open to grave doubt, and the converse rule that the ships registered in New Zealand while coasting in the Commonwealth must comply with Australian conditions will also apply to the detriment of New Zealand awards in industrial matters. New Zealand, however, appears to be in a disadvantageous position in so far that the Australian law would appear under s. 5 of the Constitution to have validity over any ship falling under its terms even in New Zealand waters, so that the subjecting of such ships to New Zealand conditions is really *ultra vires* the Dominion. If this is the case, however, the discrimination between the two Dominions seems unjustifiable, and New Zealand seems clearly entitled to have conferred upon it the same power of dealing with ships on round tours as is assigned to the Commonwealth. It could then be allowed to rest with the two Dominions to decide in what way they would arrange for the enforcement of their laws: the

[1] See Keith, *Journ. Soc. Comp. Leg.*, xi. 294–9.

obvious plan would be to provide that compliance with the rules in force in New Zealand would exempt a vessel from compliance with those in force in Australia while that vessel was engaged in the Australian coasting trade, and vice versa. But it would be impossible in any case to enforce such a proposal as was made in the reserved Bill of New Zealand, No. 85 of 1910, which claimed to put New Zealand rates of wages in force on every ship which traded from New Zealand to Australia: such a rule could have applied to all ships whether Australian or connected with the United Kingdom, and apart from the territorial limitation of New Zealand legislation would have been impossible to enforce, and obviously unworkable: if every country provided that all ships which left its ports were to pay wages prescribed by it the result would be chaos.

Even in the admitted case of the right to control the coasting trade the difficulties of the position are serious enough. In the first place, the term coasting trade is certainly ambiguous, and the obvious difficulty has already arisen in New Zealand whether a vessel, which spends a certain amount of time on the coast of the Dominion, and towards the end of that period carries some cargo gathered in one port to another port and discharges it there, can be held to have been engaged in the coasting trade for the whole period of its presence in New Zealand waters, or only when actually coasting.

In the case of *The Captain and Owners, SS. Durham* v. *The Collector of Customs, Wellington*,[1] the Supreme Court of New Zealand had under its consideration the question of the power of the Dominion to regulate the coasting trade.

The SS. *Durham* commenced her voyage in England, where she shipped her crew at the rates of pay ruling there. In January 1911 she arrived at Auckland, New Zealand, from the west coast ports of England with general cargo. Having discharged all her Auckland cargo she loaded some cargo for the west coast ports of England which was her destination. From Auckland she proceeded first to Wellington

[1] 31 N.Z.L.R. 565.

and then to Lyttelton, and at each port discharged further cargo from England. She then went on to Port Chalmers, where she discharged a further part of her outward cargo and loaded cargo for English ports. She next proceeded to the Bluff, where further cargo was discharged and where, prior to loading any cargo, instructions were received by cable from London on February 3 varying the steamer's destination in England to the Port of London. After receiving these instructions, some cargo which the shippers had intended to be sent to west coast ports was loaded on board at the Bluff, and this, together with what had been collected at the other ports, was carried to Wellington, where it was unloaded into the steamship *Sussex*, a vessel belonging to the same owners, destined for the west coast ports of England.

The question arose on an application for an order against the *Declaratory Judgements Act*, 1908, interpreting s. 75 of the *Shipping and Seamen Act*, 1908, with a view to ascertaining whether the movements of the SS. *Durham* brought it within the rules affecting the coasting trade and, in particular, the requirement of the *Shipping and Seamen Act* of paying coastal rates to the seamen while engaged in the coasting trade. The plaintiffs admitted that they were liable to pay coastal rates to the seamen with respect to the voyage from the Bluff to Wellington, while the Collector of Customs claimed that the vessel was engaged upon coastwise trade for the whole time when she left Auckland on January 20, 1911, until her return to Wellington on February 14, 1911.

On the other hand, the Solicitor-General for the defendant pointed out that the validity of the provisions of s. 75 depended upon s. 736 of the Imperial *Merchant Shipping Act*, 1894, and argued that if the vessel once took part in the coasting trade it fell within the provision of the New Zealand Act. He argued that there were various possible meanings of coastal trade, namely, firstly, that it included every ship which went from one port of the coast to another on a trading venture: secondly, that it included any ship

which loaded cargo at one port of the coast and discharged it at another, and thirdly, that it included only ships which were habitually engaged in those occupations. The last meaning was too narrow a sense, and the Legislature must be taken to be authorized to deal with all ships which carried cargo from one New Zealand port to another. On the other hand, it was replied on behalf of the plaintiffs that, if the meaning of coastal trading were as suggested, the New Zealand Legislature would have the right to control any vessel from overseas which landed cargo at more than one port in New Zealand, and the power to regulate shipping referred only to the time when ships were actually engaged in the coastal trade.

Chapman J., in deciding the case, pointed out that the question turned on the interpretation of s. 75 of the *Shipping and Seamen Act*, 1908, which had to be construed with reference to s. 2 of that Act and s. 736 of the *Merchant Shipping Act*, 1894. S. 2 of that Act, which was originally passed in 1896, while declaring that the Act should apply to all British ships registered at, trading with, or being at, any port within the jurisdiction of New Zealand, and to the owners, masters, and crews thereof, declared that the provisions of the Act were to be so construed as not to exceed the legislative powers conferred on the General Assembly by the Constitution Act, a term which no doubt included s. 736 of the *Merchant Shipping Act*, 1894, as that Act modified the Constitution Act by enlarging its scope and so extending the ambit of the expression 'peace, order, and good government of New Zealand'. Now s. 75 of the *Shipping and Seamen Act* provided that when seamen were engaged in New Zealand, or, having been engaged abroad were employed in New Zealand, the seamen while so employed should be paid the current rate of wages for the time being ruling in New Zealand. In this absolute form the sentence would be *ultra vires*, as it did not relate exclusively to the coasting trade of New Zealand, but a proviso was added: 'Provided also that this section shall not apply to ships arriving from abroad with passengers or cargo, but not trading in New Zealand further or otherwise than for the

purpose of discharging such original passengers or cargo in New Zealand and there shipping fresh passengers or cargo to be carried abroad.' In a sense a ship which navigated from port to port for the purpose of discharging its cargo or picking up cargo for the outward voyage was employing seamen in New Zealand, but it was at least doubtful whether such a vessel was engaged in the coasting trade. He referred to this as doubtful because it might be that elsewhere in the Empire conditions existed which rendered it necessary to impose on all British ships the duty of taking a tug or of carrying pilots or of doing other things which entered into the conception of the coasting trade. But in the case before him the matter to be settled was simply whether or not the SS. *Durham* came within the benefit of the proviso. In his opinion the question must be considered from the point of view of the time when the Collector of Customs had to consider under s. 75 whether or not it was his duty to detain the final clearance of the ship on the ground that the proper wages had not been paid. It was admitted that at that time the vessel had been engaged in coastwise trade, but it was argued by the plaintiffs that the obligations and the proviso were distributive and that a vessel carrying cargo coastwise might be at one time within and at one time without the protection. That was not, in his opinion, the intention of the Legislature, and it was not the intention of the Legislature that the matter should depend on the intention with which the cargo had been shipped originally (namely, that it should be conveyed from New Zealand in the SS. *Durham* to west coast English ports). It would be a matter of great inconvenience if a vessel were merely to be required to pay coasting rates for the time when it was actually engaged in carrying coastwise traffic between two ports, and a vessel might thus for short periods be within the provisions of the law and for short periods be without it. It was, in his opinion, clearly within the power of the Legislature to provide, as it had provided, by making two distinct classes—those which never fell within the coastwise trade, and those which fell within

it, and, in his opinion, the SS. *Durham* during the whole period between its departure from Auckland on the 20th of January and its return to Wellington in February was engaged in the coasting trade.

It is of particular interest to note that Chapman J. treated the whole question of merchant shipping as being one in which the Dominion Parliament had none except the express powers conferred by the *Merchant Shipping Act*, 1894. Thus he stated that earlier Imperial Acts reserved the whole subject of shipping legislation to the Imperial Parliament, and he treated the *Merchant Shipping Act* of 1894 as if it for the first time conferred upon the Dominion Legislature any power to deal with coasting trade, though the Act of course dates back to 1869.

The second question of importance which arises is that of the mode in which the effective enforcement of the law as to the regulation of the coasting trade can be carried out. It is clear that so far as accommodation is concerned there is no difficulty, but the question of wages seems insuperable. The owner is not subject to the jurisdiction of the Commonwealth outside the coast[illegible]rade, and, if he chooses to arrange with the seamen [illegible]onsideration of the higher wages which they will rece[illegible]nile on the coast they are to be paid less wages elsewhere, it is difficult effectively to prevent his so doing. The difficulty is met in the Commonwealth Act by providing that a seaman shall not be deemed to receive the due wages if he is paid less when outside the jurisdiction of the Commonwealth, on the ground that he has been paid more within, but the effectiveness of such a provision may be doubted if the payment of lower wages takes the simple form of decrease in the normal rates for the main part of the voyage, based on the commercial fact that higher wages will be paid for the coasting portion of the voyage; and it is obvious on economic grounds that the mere intervention of one legislature cannot affect really the wages of the sailors for the voyage as a whole. The main object of the Commonwealth Parliament is doubtless, however, to discourage the use of lascars as crews of vessels

which desire to do coasting trade, and, while in their case the difficulty of pay might easily be overcome, the real obstacle will be the conditions of structure which are required from all coasting trade vessels.

The Commonwealth Act, indeed, frankly recognizes that its validity as a whole is not free from doubt, and an amendment introduced by the Government in 1912 expressly provided that the Act was to be construed in the sense which gave it legal validity. The same sense of doubt as to its effect is shown in the elaboration of the provisions which are inserted to secure the fulfilment of the rule regarding wages: a memorandum of the new rate of wages is to be made on the agreement, and the wages must be paid before the ship leaves its last port in Australia: moreover, if the ship does not conform to the conditions in question, it may be disqualified from ever again engaging in the coasting trade, which it can only do under a licence. Further doubt is also thrown on the powers of the Commonwealth by the decision in the case of the *Kalibia*,[1] in which the High Court laid it down that the power of the Commonwealth Parliament to enact a law giving compensation to seamen was confined to seamen engaged in inter-state or foreign trade, and did not apply in the case of mere intra-state trade. It is also clear that despite the constant discussions with the Imperial Government since 1908, it has not been found possible to eliminate all the cases of *ultra vires* legislation from the measure. It was, indeed, only in 1912 that the Commonwealth Government consented to withdraw a clause which provided that the cancellation of an officer's certificate by a Court of Marine Inquiry in the Commonwealth should debar an officer from serving in that capacity in Australia, even if his certificate had been returned to him under the statutory power conferred on the Board of Trade by s. 474 of the *Merchant Shipping Act*, 1894, a provision which, unless limited to ships within the legislative competence of the Commonwealth, was clearly *ultra vires*. Even then the Government could not see their way to delete

[1] SS. *Kalibia* v. *Wilson*, 11 C.L.R. 689.

a clause which prescribed the adoption at all seasons of the year of the winter load-line, or, in the case of sailing vessels, the North Atlantic load-line in respect of cargoes of dead-weight cargo other than coal, although, apart from the impossibility of defending the Act in this regard from the charge of *ultra vires*, the Board of Trade adduced arguments to show that the proposal was one which could not be defended on grounds of seamanship. It is a minor matter that many other provisions are open to doubt of their legality, such as the transfer to the Attorney-General in place of the Governor-General of the authority to permit prosecutions for sending unseaworthy ships to sea, and the appropriation to the Commonwealth of the proceeds of wreck which by an intricate course of legislation are really the property of the Imperial Treasury, being Crown rights surrendered by the Crown under the *Civil List Act* in exchange for a civil list.

In the case of Canada also there has been difficulty arising from the doubt as to the validity of the legislation of the Dominion regarding shipping,[1] and a Bill to remedy the doubts by expressly securing that the laws of the Dominion regarding shipping should be applicable to all vessels registered in the Dominion or engaged in the coasting trade was introduced by the Government but delayed by the outbreak of war. The difficulty in the main arose from the failure to observe the terms of the legislation regarding the conditions on which the coasting trade and registered shipping could be governed, the necessity of suspending clauses in the Acts having been overlooked after the earliest shipping legislation. In that case the confusion which formed the subject of representation by Mr. Brodeur, Minister of Marine, at the Imperial Conference of 1911, was due to the carelessness of the law officers of the Dominion, but the trouble which has arisen in this case is a proof of the complication of the position. Even in Newfoundland, shipping legislation has proved provocative of difficulty, though of a minor kind.[2]

[1] *Parl. Pap.*, Cd. 5745, pp. 419, 420.

[2] See *Parl. Pap.*, H. C. 160, 1912, p. 3.

A further difficulty which arises even when the powers of the Dominions are duly exercised requires consideration. If the Dominion have power to regulate merchant shipping registered in these Dominions, as seems only proper, can they insist that their rules shall hold good in the ports of the United Kingdom, and if so, can their rules be enforced there—and in the ports of other Dominions—by the local courts on the authority of the Dominion Acts? The answer to this question is far from obvious, and it is not covered by any judicial authority. In the case of the Canadian load-line question above referred to, it was denied by the Imperial Government on the ground that there was express provision in the *Merchant Shipping Act* for the recognition under certain conditions of load-lines marked by Colonial Governments as equivalent to the British-marked load-line, and that this provision excluded the application of the doctrine that the Colonial Parliament could make any load-line it thought fit valid, in respect of ships registered in the particular colony concerned, throughout the Empire and in the courts of the United Kingdom. The same principle was adopted in the case of the *Wireless Telegraphy Act*, 1904. By Order in Council of February 29, 1908, it was ordered, in virtue of the power conferred by the Act to extend its operation to British ships on the high seas, that the Act should apply to all British ships on the high seas, provided that a person on board a British ship registered in any British possession should not be deemed to commit an offence against the Act by reason of the installation or working of wireless telegraphy on such a ship, if the authority in such possession, having power by law to do so, had granted a licence for the installation and working of wireless telegraphy on the ship and the person was acting in accordance with the terms of the licence. It is clear that this contemplated a state of things under which it would be open to each Dominion to regulate the use of wireless telegraphy on board its own ships, but left the use of wireless telegraphy in the territorial waters of the United Kingdom to be regulated in each case under the law of the United Kingdom,

and the use in the territorial waters of the Dominions to be regulated by the law of the Dominions. In practice, however, it was considered by the Dominions and the United Kingdom unnecessary to interfere with the use of wireless telegraphy if the ship was licensed by one party and was using its wireless telegraphy in accordance with the licence. There was thus a perfect state of reciprocity in the matter. This condition is not, however, observed in the *Merchant Shipping (Convention) Act*, 1914, the last important Act bearing on the subject. That Act provides many rules regarding the safety in navigation of British ships, registered in the United Kingdom, embodying the results of the International Convention signed on January 20, 1914, as a result of the lessons of the *Titanic* disaster. By s. 23 of the Act, compliance with the provisions of Parts II and III of the Act relating to the manning, construction, or equipment of passenger ships, or relating to the provision of wireless telegraphy and wireless-telegraph watchers and operators on a ship, and representing provisions of the Convention, shall be required in the case of a foreign ship or a British ship not registered in the United Kingdom which comes into and proceeds to sea from a port in the United Kingdom in the same manner as compliance would be required in the case of a ship registered in the United Kingdom. A certificate of safety granted by the Government of such a ship, if recognized by the Board of Trade as granted in accordance with the Convention, shall have the same effect as a safety certificate granted to a British ship registered in the United Kingdom. Moreover, such ships shall be entitled in the British Islands to exemption in whole or part if they hold certificates duly granted under the terms of the Convention and recognized by the Board of Trade. It is of course the case that these provisions are necessary in accordance with the terms of the Convention in order to make it really effective, but the fact remains that the British legislation will be effective on registered ships throughout the Empire, and even in territorial waters, while the Dominion legislation would not be effective in the

waters of the British Islands to override the provisions of the Imperial Act. From the practical point of view, as the three great Dominions, Canada, the Commonwealth of Australia, and New Zealand, were duly represented at the discussion, the Convention was certain to be adopted by the legislation of these Dominions, and so the law would be uniform throughout the Empire; but the theoretic distinction of the Imperial and Dominion powers remains as an anomaly. Moreover, the Act is unhappily silent on the question whether the rules of the Dominions can be enforced in the courts of the United Kingdom and of the other Dominions, and this is a matter of very considerable importance because of the provisions of the first part of the Act. These sections impose on the master of any ship registered in the United Kingdom the obligation to report derelicts, to observe certain rules of careful navigation near ice, and to render assistance on receiving a wireless call of distress; and it also imposes obligations on owners of a fleet of such ships to publish notices of their Atlantic routes. Not one of these provisions is made applicable to a self-governing Dominion's ships, for, though by s. 24 they do apply to the vessels registered in the possessions without self-government, they are by that clause excluded from operation in the self-governing Dominions and also British India. The result is that, if no legislation is passed in the Dominions regarding ships registered therein, the owner of a British ship who wishes to save the master of his ship the liabilities imposed by Part I of the Act need merely register his ship in such an oversea Dominion. But if he does so, and the Dominion legislates, the question at once arises whether the legislation can be enforced in any court of the United Kingdom. The point is of some interest, for though the offence of not complying with the provisions of the Colonial law could be punished in the Dominion, nevertheless, as the ship need never go near the Dominion, it might avoid compliance with the Act *in toto* and yet be exempt from penalty, unless such a penalty could be enforced in the courts of the United Kingdom or of another Dominion. To take

a concrete case, ships registered in Newfoundland might trade only between Canada and the United Kingdom and disregard the rules of the Atlantic navigation without penalty. The alternative theory is to hold that as the power to regulate the registered shipping of a Dominion must be meant to supersede the Imperial Act which it is allowed expressly by s. 735 of the *Merchant Shipping Act* to amend, it must be assumed that it takes the place of the sections of the Act and can be enforced in the courts of the whole of the Empire, just as the *Merchant Shipping Act* itself can be enforced. The argument may be correct, and if not, it is clear that there is a lacuna of some importance in the network of shipping legislation.

It does not seem that there is any ground of theory or of practice which stands in the way of the adoption of a perfect reciprocity between the self-governing Dominions and the United Kingdom in the matter of shipping legislation. This perfect reciprocity does not at present exist, because of the rule that the United Kingdom can regulate shipping registered in a Dominion when within the waters of the United Kingdom, while the Dominion Parliaments can do this only if the ship registered in the United Kingdom is at the same time engaged in the coasting trade of the Dominion. To effect perfect reciprocity it should be provided that the Dominion legislation regarding the shipping registered in the Dominion shall be applicable to any registered ship in the United Kingdom, save when such a ship is engaged in the coasting trade, or in the alternative, it should be provided that the Dominion Legislatures have full power to deal with all British shipping which comes to their coasts while on their coasts, which is the position of the Imperial Parliament with regard to Dominion-registered shipping in point of practice. The former proposal seems by far the more reasonable, since to interfere with the registered shipping of a country save on some serious ground, such as competition with the local coasting trade, is contrary to international practice, and there is no good ground for differentiating between the relations of the United Kingdom

and the Dominions and the relations of the United Kingdom and foreign countries in this question.

A further reform, which is surely desirable in the constitutional relationships between the United Kingdom and the Dominions in this regard, is the abolition of the absurd rules regarding the insertion of suspending clauses in legislation regarding registered and coasting shipping.[1] these clauses ought not to be necessary if the principle of the division of powers of legislation is clearly recognized, and there is no just ground on which the autonomy of the Dominions in this matter should be hampered and fettered. The proper mode of dealing with objections to the terms of *intra vires* legislation is by representations from the interested parties, supported where proper by the views of the Board of Trade, as is done in the case of foreign shipping legislation affecting British vessels through the Foreign Office. It is not unnatural that the Legislature of a Dominion should feel some surprise that legislation which is freely passed by the United States should be questioned and held in suspense when enacted by the Dominion. Moreover, the United States precedent is an unhappy one, for that country in its merchant-shipping legislation frequently contravenes the rules of international comity, as in the famous Harter Act, which in its application in the Commonwealth,[2] New Zealand,[3] and Canada, has been much modified and limited in operation to shipping documents entered into in these Dominions, or in respect of the carriage of goods from these Dominions, while the American Act purports to regulate both carriage to and carriage from the States.

It is of course certain that with increased freedom of legislation British shipping might be exposed to some hampering rules, but it may be doubted if these would prove

[1] Also as to Admiralty jurisdiction, 53 and 54 Vict. c. 27, s. 4, but approval before enactment is allowed in that case, which is far more convenient and is usually resorted to.

[2] Act No. 14 of 1904.

[3] Act No. 37 of 1911, amending Act No. 36 of 1909.

very serious in practice: the difficulties imposed by American legislation, however severe in theory, have hitherto always been overcome. What is probably more serious is already in progress: the cessation of Imperial legislation for Dominion shipping outside the United Kingdom, which is seen at its full development in the case of the *Merchant Shipping (Convention) Act*, 1914, has led to the danger that Dominion legislation will lag seriously behind the British legislation. In Canada, for instance, the improvements of the 1906 Act regarding merchant shipping have not yet been adopted, and the law regarding accidents and collisions and salvage, which introduced a new standard for the apportionment of damage, remained unaltered in the Dominions long after the passing of the necessary legislation in 1911 in the United Kingdom. This failure to act, however, is a mistake which in due course Dominion Legislatures will outgrow: it is probable that part of their slowness of movement has been due to the complications of the form of legislation. An instance of the possible danger of this position can be seen in the recent Imperial *British Ships (Transfer Restriction) Act*, 1915,[1] which provides that with effect from February 12, 1915, any transfer of a British ship or a share therein to persons not qualified to own a British ship shall be subject to the approval of the Board of Trade on behalf of His Majesty, and the attempt to make a transfer without such permission shall be a misdemeanour, apparently wherever the attempt to transfer is made, whether within or without the British Islands. But the Act applies only to British ships when not registered in one of the self-governing Dominions,[2] and accordingly the position is that the passing of legislation with regard to their registered ships is necessary to bring about a similar prohibition, and such legislation would apparently have to be reserved or to contain a suspending clause, and cannot come into force until the pleasure

[1] 5 Geo. 5, c. 21.

[2] For this purpose and that of the Act of 1914 the Commonwealth includes Papua and Norfolk Island, these being territories under the Commonwealth Parliament, the latter since 1913, *Parl. Pap.*, Cd. 7507, p. 63.

of the Crown is formally signified in the Dominion. This position of affairs is not so serious as might be thought, since probably the actual number of ships which would be transferred to undesirable owners is small, but it remains the fact that if legislation were to be passed it would be a slow business.

CHAPTER XI

COPYRIGHT

THE subject of copyright is of considerable interest, inasmuch as no question ever raised more heated feeling between Canada and the United Kingdom, and in no matter did the United Kingdom adhere more firmly to a point which constitutionally it had no right to press as a matter of right. The question is also curious as showing the remarkable power of the publishing interest in the United Kingdom, which was able for years to thwart the demands of Canada urged on grounds of constitutional law which can hardly possibly be gainsaid.

The *fons et origo mali* was the Imperial Act of 1842 (5 & 6 Vict. c. 45), which, enacting the principles of the law of copyright, applied the principle to the colonies then existing, and thus gave to any work which was copyright in the United Kingdom a copyright which was automatic and unconditional in Canada. The difficulties of the position were soon felt; and the Imperial Government in 1846 admitted that the colonies must be given the right of regulating the terms on which reprints of works issued in the United Kingdom should be allowed to be imported from the United States into the colonies, the rule being laid down that provision must be made for charging a royalty to be paid to the author of the original work. In 1847 this was carried out by an Imperial Act which allowed of the suspension of the prohibition in the Imperial Act of any importation of copyright works in pirated copies, where arrangements were made that the importation of reprints should be charged with a suitable duty. This solution of the question was, however, temporary only, for more acute questions developed with the coming into operation of the Berne Copyright Convention, and the anxiety of the Imperial Government to

secure some measure of protection for foreign copyright in the United States of America, a country whose policy of blackmail in copyright matters was then at its most perfect stage. The Dominion was consulted and definitely agreed of its own will to join the Berne Convention,[1] and thus it bound itself, so long as it should be a member of that Convention, to refrain from passing any law which made the recognition of copyright in foreign works protected by the Convention dependent on the printing of the work in the Dominion. This disability would have been of little importance, had it not been that the Imperial Government succeeded in obtaining from the United States a very feeble measure of protection for British works, on the understanding that the law of copyright throughout the Empire forbade the insistence on printing in any special place as the condition of copyright.[2] The agreement was ludicrously unfair, as the American copyright conceded was essentially dependent on printing in the United States, while the United States author had merely to publish his book in the United Kingdom, which meant putting a few copies on sale there, and by that act he attained a copyright co-extensive with the British Empire. The result to Canada was obvious: the printers saw that the author of a Canadian book found it more convenient and preferable in every way to set up the type in the United States and then to publish the work in the United Kingdom, by which he obtained copyright for his book in Canada. The author of a work in the United Kingdom similarly, when he desired United States copyright, had the type set up there, and then, by publishing in the United Kingdom, obtained copyright in the Dominion. The matter was made more annoying by the action of British publishers, for they used regularly, even when a book was printed both in the United Kingdom and in the United States, to sell the Canadian market to the American publisher instead of supplying it with the English edition.

The resentment felt by Canada took its shape in 1889 in

[1] *Parl. Pap.*, C. 4606, 4856, 4910, and 5167.

[2] *Parl. Pap.*, C. 2870 and 6425.

the form of the enactment of a measure which would have refused copyright save on terms of printing in the Dominion, and the request for the release of Canada from the terms of the Berne Convention, on the ground that Canada had been repeatedly assured that her continuance in any treaty arrangements of this kind would be subject to her own desire to withdraw at any time, on giving the prescribed notice. On this point the Canadian Government was in an unassailable position: to refuse to arrange withdrawal was a clear breach of the understanding on which the adherence in such a case was given. But the desire to withdraw was obviously merely connected with the desire to secure the abrogation of the rule that publication in the United Kingdom gave copyright in Canada, and this desire the Imperial Government were determined not to concede, for the simple reason that they were persuaded by the publishers that the result would be the loss of even the limited American copyright, a fear probably reasonable enough in itself. The royal assent was therefore refused to the Canadian Act, which still remained a dead letter on the Canadian statute book. This was not naturally acceptable to Canada, and Sir John Thompson in 1891 and again in 1894, on his last visit to the United Kingdom, urged most strongly the unfairness of the position.[1] His excursion into constitutional law, in which he argued that the *British North America Act* gave Canada the power to repeal Imperial Acts passed before 1867, was supported by invalid instances, and was probably a mere *tour de force*; but his constitutional claim could not possibly have been resisted for a moment if seriously examined. To insist that Canada should conform her copyright legislation to that of the United Kingdom merely to please the publishers in the latter was constitutionally a monstrous doctrine, nor can it be wondered that the minister described the state of the law as odious and unjust. It is possible that the energy of his representations would have had effect in the long run, but his death at Balmoral terminated for a time the movement: the

[1] *Parl. Pap.*, C. 7783.

politics of the Dominion fell into less effective hands, and by the time the Government had come into the control of Sir Charles Tupper the troubles of the Ministry over the question of the Manitoba schools had become so pressing as to allow all else to disappear. The matter would presumably have again raised its head, when the establishment of Liberal government in Canada left the way clear for further action, but by that time the British publishers and authors, realizing the danger of their position, had taken the necessary steps to place themselves on terms with the Canadian publishers, who, satisfied with the new position, and not interested in the mere question of printing in itself, ceased to press the question on the attention of the Dominion Government, nor does it appear that the matter would have been raised again by the Dominion if circumstances occurring elsewhere had not called the matter into prominence.

These circumstances were in the main the growing desire of the publishers and authors of the United Kingdom to secure better terms of copyright: with this object several pilgrimages were made to Canada in the hope of winning approval there for new legislation which would be applicable to the Dominion, but without much result; and it was not until the conclusion of the new Berlin Convention in 1908 that further legislation became necessary, and the Government were faced with the need of examining the problem afresh. A little consideration showed that there was no possibility of maintaining the old status of things, that the Government of Canada were in a completely conclusive case, and that there must be a reconsideration of the whole affair. The reconsideration took the form of a Conference held in London in 1910,[1] being the first subsidiary Conference held under the scheme of Imperial Conferences arranged in 1907, and it was agreed that in any further copyright legislation the Dominions must be left unfettered to do what they thought fit, though the general feeling of the Conference was in favour of the acceptance of the Berlin Convention, subject to the making of such provision as would prevent

[1] *Parl. Pap.*, Cd. 5272.

the possibility of an American author obtaining copyright in Canada by mere publication in a Union country.

In the Imperial *Copyright Act*, 1911, accordingly, the application of the Act was declared not to include the self-governing Dominions unless the Act were declared to be in force therein either as it stood or with modifications as related to procedure and remedies and other adaptations to fit the Act to the circumstances of the Dominion. But even if this were not done, if the legislation of any Dominion were certified by the Secretary of State to be such as to confer on works whose authors were British subjects resident elsewhere than in the Dominion or, not being British subjects, resident in those parts of the British possessions to which the Act extended, the Dominion was to be treated for the time while this state of affairs lasted as being a Dominion to which the Act extended for the purpose of the rights conferred by the Act. It was further provided that a Dominion legislature could repeal any of the Imperial copyright legislation, including the Act of 1911 itself, while, until the legislature did do, there would be left in operation the Acts previously in force. If the Act did not extend to any Dominion, the King was empowered by Order in Council to grant to works first published in that Dominion and to authors who were resident therein at the time of the making of their works, the protection of the Act on such conditions as seemed proper, if the Dominion gave adequate protection to the works, published or unpublished, of authors who were resident being British subjects in some place other than the Dominion at the time of the making of the work. Such an Order in Council was not, however, to apply to any self-governing Dominion to which the Act might extend, but the Governor in Council of the Dominion was authorized to extend the like rights within the Dominion. It was further provided that any legislature of a British possession might modify or add to the Act, but save where the additions or modifications related to procedure or remedies, the changes must apply only to authors resident in the possession at

[1] *Parl. Pap.*, Cd. 6863, pp. 130–3.

the time of making the work and to works first published in the possession. In the case of Part II of the Act authorizing the grant of foreign copyright on certain conditions, the same power of granting the right was conferred on the Governor in Council of any Dominion to which the Act extended.

This mass of legislation was clearly confused in the extreme, and the only mode in which it could have been rendered reasonably simple would have been the immediate adoption of the Act with necessary changes as to procedure by the legislatures of the several Dominions. But here, as usual, there was considerable delay and divergence of procedure. Australia finally, in 1912, legislated by Act No. 20, which, while adopting the Imperial Act, provides in a satisfactory way for the necessary local changes : it must, however, be noted that the provision for the establishment of a system of voluntary registration, with special advantages in the way of procedure to those whose works are registered, seems hardly to be consistent with the principle of the Berlin Convention, to which accession has been expressed in respect of the Commonwealth. Newfoundland legislated in the same year (c. 5), but the Act is defective, inasmuch as it makes no provision at all for the necessary modification of the measure to meet local circumstances. In 1913 New Zealand legislated, but in this case the Act was not expressed to extend the Imperial Act to New Zealand, but legislation was passed based on the same principle as the Imperial Act, though there were slight omissions in it, of no great importance. In respect of these Dominions also has adherence been expressed to the Convention.

By a curious irony of fate Canada, which was for years so eager to get rid of Imperial control, has sunk into indifference, or comparative indifference to the issue, and no legislation has yet been passed to repeal the Imperial Acts which fettered her right of action. Indeed, it has become necessary to issue an Order in Council in the case of both Canada and the Union to protect the works of authors there, since it is clear that in the absence of such orders these works could

obtain no protection from the Imperial Act ; while, on the other hand, there is accorded, it would appear, protection to works produced in the United Kingdom in so far as that the old Imperial Acts are still in force therein.

Moreover, the wishes of Canada, as expressed at the Conference of 1910, have been carried into effect by the negotiation of an additional protocol to the Convention of November 13, 1908. This document,[1] signed at Berne on March 20, 1914, by all the powers signatory to the Convention of 1908, and ratified by the King on July 18, provides that, where any country outside the Union fails to protect in an adequate manner the works of authors who are subject to the jurisdiction of one of the contracting countries, nothing in the convention of 1908 shall affect the right of such contracting country to restrict the protection given to the works of authors who are at the date of the first publication thereof subjects or citizens of the non-union country in question, and who are not effectively domiciled in one of the countries of the Union. The right accorded by the protocol to contracting States belongs equally to any of their oversea possessions. No restriction, however, introduced in virtue of the protocol shall affect the rights which an author may have acquired in respect of a work published in a country of the Union before the application of such restriction. Notice of the restrictions imposed shall be given to the Government of the Swiss Confederation by the States which restrict the grant of copyright in accordance with the protocol, and the declarations shall be communicated to the States of the Union by the Swiss Confederation. The protocol is to take effect one month after the deposition of the ratifications which were to take place not later than one year from the date of signature.

[1] *Parl. Pap.*, Cd. 7613.

CHAPTER XII

NATURALIZATION AND NATIONALITY

NOTHING seems more characteristic of the sovereign character of the Imperial Parliament than its power to legislate regarding nationality, but the view that the grant of legislative authority to a colony carried with it the right to confer upon that person the status of a British subject, was quite early developed, and it received its full approval in the Imperial *Naturalization Act*, 1870, re-enacting an Act of 1847, in which the validity of the naturalization of aliens within the limits of the British possessions under enactments of these possessions was recognized. The Act, however, in doing this merely confirmed what has been the accepted view: that the local legislature had power to confer the status of a British subject, but only within the limits of the Colony. Indeed, the principle was carried many years after a good deal further, for, by Order in Council, provision was made for the naturalization of aliens in the Protectorate of Southern Rhodesia, though this was obviously a somewhat strong step to take in respect of territory, the essential feature of which is that it is not British.[1] On the other hand, the grant of naturalization in the United Kingdom was held to confer the status of a British subject throughout the whole of the Empire, though this position was long doubtful, and though the contrary view was held to be supported by the language of the statute itself. The question was never authoritatively decided in the self-governing Dominions: parts of their legislation seemed to suggest that a person naturalized in the United Kingdom might not be a British subject in the British oversea possessions, but other parts suggested the opposite conclusion,

[1] Cf. *R.* v. *Crewe, ex parte Sekgome*, [1910] 2 K.B. 576.

and it is most probable that the general impression was that such a person was a British subject for all purposes.[1]

The position of the person naturalized in a British possession had very obvious disadvantages, partly of sentiment and partly of substance. In the Dominion of Canada, for instance, it was easy for any immigrants from the United States to become naturalized as citizens of Canada, but this fact did not convert them outside Canada into British subjects; and though they might become loyal Canadians, excellent judges like Sir Wilfrid Laurier could feel doubt whether they were equally sure to become excellent British subjects. From the practical point of view the difficulty has no doubt been exaggerated from time to time. The grant of naturalization in the United Kingdom is not sufficient to enable the United Kingdom to protect a foreigner naturalized therein unless he has under the law of his place of origin ceased to be a subject of that State, and the foreigner who had naturalized himself in Canada was therefore in theoretically just the same position with regard to British protection as was the man naturalized in the British Islands. It is, however, true that this similarity of position was often misunderstood,[2] and British diplomatic officers have been sharply criticized in Dominion Parliaments for not protecting persons naturalized in the Dominions, on the ground that they were so naturalized, when, as a matter of fact, the case of the persons concerned was precisely similar to that of a person naturalized in the United Kingdom. There was, indeed, formal difference in the case of the passport issued to naturalized persons in the oversea Dominions and the ordinary form of passport, which made it appear that the naturalized person was only entitled to the assistance of the British representatives

[1] So asserted by Lord Emmott in House of Lords March 17, 1914, and Mr. Harcourt in House of Commons, May 13, 1914. The opposite opinion has often been expressed in England and Canada, e. g. *House of Commons Debates*, Jan. 29, 1913.

[2] In practice also in France; at least some difference of treatment seems to have been accorded as regards liability to military service.

abroad as a matter of courtesy. The words were perhaps inserted on the ground that in a foreign country a person naturalized in a Dominion was without any nationality, or at least, without any British nationality, and the British Government could not as of right afford him good offices; but whatever the origin of the words, the practice was precisely the same in every case: the assistance of the representatives of the Crown abroad was as fully accorded as it was to natural-born British subjects.

So far, therefore, as executive action mattered, the position of the person naturalized in a British colony was assimilated to that of a person whose British nationality prevailed throughout the Empire. But there were certain provisions of law which could not be evaded in whole by the action of the executive. It was not possible to confer a peerage or a privy councillorship on an alien, and a person naturalized in a Dominion was in the United Kingdom an alien, though he might have held ministerial office in the Dominion in which he was naturalized.[1] Moreover, such a person was not qualified for the parliamentary or the municipal franchise in the United Kingdom, nor, until special permission was given in the *Merchant Shipping Act*, could he own a British ship. A will made by him did not fall under the benefit of Lord Kingsdown's Act, and he was not a British subject in the meaning of the *Foreign Jurisdiction Act*, 1890, and the Orders in Council issued under it, though he might be treated as a British protected person in some cases. Thus criminal jurisdiction exercised over him by virtue of the Act would have been, strictly speaking, unlawful. On the other hand, he would not be entitled in a country like China, if not ranked as British subject, to the protection of the extra-territorial jurisdiction of the Crown. He would not fall within the penal clauses of Acts punishing British subjects for such acts as murder and bigamy committed outside the British Dominions, nor be liable to the penalties imposed by the *Official Secrets Act*,

[1] e. g. Sir G. Perley, Honorary Minister in the Canadian Government, one of the first to be naturalized imperially under the Act of 1914.

1911, on British subjects for offences against that Act, wherever committed.

It was natural that with a growing sense of nationhood there should arise a growing sense that there should be one common naturalization for the whole Empire. The naturalization law was considered in great detail by a Committee in 1901,[1] and many of its defects were rendered obvious. A distinct movement towards final agreement with regard to the matter was made at the Colonial Conference of 1907,[2] when the question was dealt with in some detail, and the outlines of the proposed new legislation considered. It was realized on all sides that the fundamental root of the difficulty was the absolute separation of the two kinds of naturalization: the British naturalization could only be obtained either by service under the Crown or by residence in the United Kingdom, while the Dominion naturalization was restricted to cases where the residence had taken place in the Dominion. No length of mere residence in a Dominion, despite naturalization there, as the law stood would be of the slightest aid to a man in becoming naturalized in the United Kingdom, but, like any newly-arrived alien he would have to reside for five years and declare his intention to continue to reside or to serve abroad under the Crown.

The obvious mode of dealing with the question at issue would have been that suggested by Sir Wilfrid Laurier—to declare that every person naturalized in any Dominion should have the status of a British subject throughout the whole Empire; but in 1911 the Imperial Government was not ready to take this course. There were considerable difficulties in the way, especially as regards the period of residence which was required to elapse before naturalization could be accorded. The United Kingdom period of five years was equalled nowhere in the Dominions: New Zealand prescribed no fixed time; Australia, where by Act No. 11 of 1903 a uniform Commonwealth naturalization was prescribed, two years; this period was adopted by the Union of South Africa when laying down a universal South

[1] *Parl. Pap.*, Cd. 723. [2] *Parl. Pap.*, Cd. 3523 and 3524, pp. 94-9.

African naturalization, and Canada alone demanded three years. Nor in all cases was it certain that Dominion naturalization was not to some extent abused in the desire to obtain passports. There were certainly a certain number of aliens who became naturalized in Canada, on the strength of residence and of declaration of intent to reside in the Dominion, who shortly after started for travels which seemed to indicate an intention of a very distant return to Canada. Another consideration, not without importance in some aspects, was the fact that, for example in the case of Australia [1] in the grant of naturalization, a discrimination was made between Europeans who were eligible and non-Europeans who could not be naturalized, and it was held that recognition by an Imperial Act of these differences of treatment might be deemed to be equivalent to introducing into Imperial legislation the hateful principle of a colour bar. Nor again could it be doubted that many of the persons who obtained Colonial naturalization appeared to have done so without adequate consideration by the local authorities of the probability of their becoming good citizens. Not a few of them, at any rate, were disgracefully illiterate, and in many ways undesirable.

The Imperial Conference [2] accordingly agreed on a compromise, under which, while local naturalization was to go on as before at the unfettered discretion of each Dominion Parliament, there should be created a new entity, Imperial naturalization, which would have the effect of conferring British nationality throughout the Empire and, so far as international law permitted, throughout the world. The period of five years would be retained as the condition for this nationality, but residence in any part of the Empire should count in this period, while the decision whether any individual deserved the grant should be entrusted to the Government of that portion of the Empire in which he had spent the last twelve months before the grant. Further,

[1] Act No. 11 of 1903; so Natal Act No. 18 of 1905, superseded by Union Act No. 4 of 1910.

[2] *Parl. Pap.*, Cd. 5745, pp. 249–71.

in order to meet the susceptibilities of the Dominions, the Act should not legislate for them, but should be framed so as to allow them to make it effective within their boundaries by their own legislation. Finally, it was agreed that it should be made clear that the mere question of nationality as dealt with in the Act should not affect the validity of any Dominion legislation dealing with immigration or differentiating against different classes of British subjects. This last proposal was due to the widespread fear that in some way the grant of Imperial nationality would give an immunity from all laws affecting immigration or imposing disabilities in naturalized persons, and so forth, quite a number of Australian State Acts [1] differentiating for purposes of political rights between persons natural born and naturalized.

The resolution of the Conference was only tardily carried into effect, a result due to the change of government in Canada and the somewhat long time taken by the Canadian Government to make up its mind on the question at issue. The objections of Canada were based, as might be expected, on constitutional grounds:[2] the Government were most anxious not in any way to seem to interfere with the power of Canada to prescribe its own conditions of nationality or to determine what was the position in Canada of persons having Imperial nationality. Finally, agreement was reached, and the Imperial *British Nationality and Status of Aliens Act*, 1914,[3] deals with the question on the agreed basis. It provides for the grant by the Secretary of State of a certificate of naturalization to any alien on proof of five years' residence in the British Dominions in the eight years preceding his application and one year's immediately preceding residence in the United Kingdom, or, in lieu, five years' service under the Crown. An applicant must be of good character and have an adequate knowledge of the English language, and must intend either to reside in the

[1] *Parl. Pap.*, Cd. 5746, pp. 248, 249.

[2] Cf. Canada *House of Commons Debates*, Jan. 29, 1913.

[3] 4 and 5 Geo. V, c. 17.

British dominions [illegible] to serve under the Crown. In the case of a woman whose alienage is due to marriage, and whose husband is dead or is divorced from her, the period of residence may be dispensed with, and in any special case the rule regarding the [illegible]n of eight years may be relaxed. A person thus [illegible] is given all the privileges of a natural-born [illegible]ject, the few restrictions on the rights of naturalized [illegible] preserved by the Act of Settlement [1] being abolished. The name of a minor child may be included in the certificate granted to an alien, but such a child may renounce [illegible]tionality within a year of attaining full age, and in [illegible] case the Secretary of State may grant a certificate to a minor if he sees fit. Any certificate issued may be revoked if granted on false representations or fraud.

The powers of the Secretary of State to grant a certificate may be exercised by the Government of any British possession on the same terms *mutatis mutandis*, and with the addition that, where another language is recognized as being on the same official footing as English, that language may be accepted as an alternative to English, as is the case with French in Quebec, and Dutch in the Union of South Africa. Any certificate so granted shall have the same effect as one granted by the Secretary of State. But the legislative authority of the Dominions is preserved by the enactment that this part of the Act and any certificate of naturalization granted under it shall not have effect within any of the Dominions enjoying self-government unless it is adopted by the Dominion legislature. Such adoption may be rescinded by the legislature, but without prejudice to legal rights existing at the time of rescission, and in adopting the Act the legislature may make provision as to how the powers of the Government are to be exercised.

The Act further lays down—and this generally and without reference to legislation by the Dominion—rules for the nationality of British subjects. A natural-born [1] British subject includes any person born within His Majesty's

[1] For the old law cf. Edwards, *Journ. Soc. Comp. Leg.* xiii. 314–26.

dominions and allegiance, thus excluding the child of a foreign ambassador who owes no allegiance; any person born out of His Majesty's dominions whose father was a British subject at the time of his birth and either was born within His Majesty's allegiance, or was a person to whom a certificate of naturalization was granted; and any person born on board a British ship, whether in foreign territorial waters or not. It is expressly provided that the child of a British subject, whether born before or after the passing of the Act, is to be deemed to have been born within the allegiance if born in a place where the Crown exercises extra-territorial jurisdiction, and that a person born on a foreign ship in British territorial waters shall not by that mere fact acquire British nationality. These two provisions are new: the first covers the case of children of British subjects in protectorates and in places like Turkey, where there is a resident British community of old standing. Moreover, the new provisions replace the rules of the Acts of 1730 and 1772[1] regarding the nationality of the children and grandchildren of British subjects born abroad. British nationality may be lost by being naturalized by any voluntary act outside the British dominions, and in the case of any person who has by birth two nationalities by a declaration of alienage made within a year of attaining majority. The national status of women who marry follows that of their husbands; but, if he changes his nationality in his life, the wife may by declaration retain her British nationality, and neither death nor dissolution of marriage shall *per se* affect nationality. Where British nationality is lost, it shall also be lost by minor children unless they would thus lose all nationality, but on reaching full age they may recover it by a declaration, and a widow's remarriage to an alien shall not alter the nationality of any children of the first marriage. These provisions are in part new, and in part far more precise and less open to doubt than the old provisions of law.

The status of aliens is regulated by the giving of all rights

[1] 4 Geo. 2, c. 21 and 13 Geo. 3, c. 21.

in regard to real and personal property, but this is qualified by the express provision that an alien shall not thus be qualified to hold real property outside the United Kingdom, not to own a British ship, nor to have any rights save such as are expressly conferred on him. His mode of trial is to be the same as that of a British subject, a provision of law which need hardly have been retained as binding the whole Empire. On the other hand, the penalty for false representations is made to apply to the United Kingdom only. The general powers of the Dominion Parliaments are preserved by the express provision that nothing in the Act shall take away or abridge any power vested in or exercisable by the legislature or government of any British possession, or affect the operation of any law at present in force, or prevent any such legislature or government from treating differently different cases of British subjects. Local naturalization is expressly authorized, as in the Act of 1870, and to remove doubt as to the validity of State legislation dealing with the rights of aliens and naturalized persons, it is provided that the power of the legislatures of British possessions shall apply to both the central and local legislatures where there are several, but subject to the proviso that no law regarding naturalization made by a local legislature shall be valid if the central legislature alone has authority to legislate in regard to naturalization.

The Act is of great importance for many reasons. It was passed with the full assent of the Dominion Parliaments and Governments, and it is expressed in large measure in terms which show that it applies without adoption by the Dominion Parliaments to the whole Empire. Indeed, it is a little difficult to see why the special case of naturalization should have been selected for Imperial legislation only to have effect with Dominion concurrence, were it not for the fact that British nationality generally had not been the subject of any Dominion legislation, and, as a Dominion is a dependency, it may be that no legislature in a Dominion would have been able to legislate so as to deprive a natural-born British subject of his nationality, though it

might deprive him of all civil rights of every kind. As it is, the law is now fixed by a measure which no Dominion legislature can in any way affect, as the saving of the powers of Dominion legislatures and governments in s. 26 cannot be construed as giving them any power to repeal express provisions of the Act, which thus fixes immutably the position of natural-born subjects, the status of wives and widows, and of children, the right of alienage and so forth. The one point of some doubt is the constitutionality of the provisions giving an alien a right to own personal property in the Dominions, and forbidding any other mode of trial than is practised for a British subject; in the Act of 1870 by a heading these sections were applied only to the United Kingdom; they seem not to be alterable now by a Dominion Parliament, and thus are placed beyond the control of the Dominions. As a matter of fact, it cannot be said that the law is already complied with in the Dominions, where it is by no means universally the rule that all personal property may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject, and it would seem that in the case of the Dominions it was not thought that the provisions to this effect in the *Naturalization Act* of 1870 were applicable *ipso facto* to the Dominions. Thus these provisions are not given as applicable to Queensland in the revised edition of the Statutes, and they were enacted in Tasmania as a new Act as No. 12 of 1913, and have also been enacted elsewhere. It is just possible that the power to alter these provisions may be supposed to be saved by the terms of s. 26, but that appears very doubtful.

While British nationality is in one sense indivisible, there is an inevitable tendency to make a distinction between British subjects in regard to their connexion with the United Kingdom or a Dominion. The term British is often applied in the Dominions to a native of the United Kingdom, and the terms Canadian, Australian, New Zealander, South African, and Newfoundlander, are regularly applied to the classes of British subjects born in these Dominions, or identified with

them by residence. In Australia there is a strong Australian Native movement, which consists not of aborigines, as might fondly be supposed, and as newly imported Governors are most unjustly credited in the popular mind with a desire to believe, but persons who being Australians were also born there. The use is significant, as it proves that there is felt to be need of a term to distinguish between the Australians by adoption and those by birth.

Nor is this practical distinction of everyday life without a result in law. In the case of the Commonwealth the power of the Parliament is confined to immigration, and, by reason of the division of powers between the States and the Commonwealth, it is not open for the Commonwealth Parliament to make of immigration a term of vague meaning sufficient to cover any person entering a State of the Commonwealth. It has definitely and very properly, it would seem, been held by the High Court of the Commonwealth that a man cannot be an immigrant if he is a native of Australia, so that while an Australian law can shut out from entry an ordinary British subject it cannot shut out an Australian British subject, and this connexion would of course include any person domiciled in Australia, for such a person cannot be held to be an immigrant by any effort of the imagination.[1] Similarly by the Immigration Act of Canada (c. 27 of 1910),[2] it is expressly provided that any person who has Canadian domicile or is a Canadian citizen shall have an absolute right of entry into Canada, and a Canadian citizen is defined as a person born in Canada, who has not become an alien, a British subject who has Canadian domicile or a person naturalized under the laws of Canada who has not become an alien or lost Canadian domicile, while Canadian domicile is acquired by a person having his domicile for at least three years in Canada. These provisions are of course in part very artificial, for that three years' domicile should be necessary to confer Canadian

[1] Cf. *Chia Gee* v. *Martin*, 3 C.L.R. 649; *Ah Sheung* v. *Lindberg*, [1906] V.L.R. 323; 4 C.L.R. 949; *Ah Yin* v. *Christie*, 4 C.L.R. 1428; *Potter* v. *Minahan*, 7 C.L.R. 277.

[2] Also c. 12 of 1911.

domicile for the purposes of the Act is at first sight wholly anomalous, the rule of domicile being merely change of abode to Canada with permanent intention of residence, but the anomaly is explained by the fact that the Act permits the removal from Canada within a period of three years of any immigrant who proves unable to support himself, so that had the right to enter Canada been given to any domiciled person the Government would have been under the necessity of allowing the entrance into Canada of persons whom it had just expelled. It may be added that the reason why, unlike the Commonwealth Parliament, the Parliament of the Dominion has power to define as it pleases the nature of immigration is because, unlike the Commonwealth, the Dominion has plenary powers of legislation on all matters save the excepted powers of the provinces, and in particular has plenary power of legislation regarding immigration, though a power in legislation in this connexion is also bestowed on the provinces. In the other parts of the Empire also the principle that the immigration laws should not be allowed to exclude a native of the Dominion in question has been borne in mind: it is recognized by the *Immigration Act*, 1913, of the Union of South Africa, and also in practice by the Government of New Zealand, and the general fairness of the principle has been expressly observed by the High Court of the Commonwealth of Australia. Nor indeed is the matter open to reasonable dispute.

From the unity of British nationality certain advantages are derived by the inhabitants of the oversea Dominions, such as the protection of the British power in the other States of the world, the free right of entry into the United Kingdom, and full political rights in that country. They also derive a somewhat remarkable advantage which has perhaps not always been realized. In the modern treaties of commerce and navigation no less than in older documents it is the custom to make express stipulations for personal rights of various kinds. Thus, to take a modern case, the treaty with Japan of 1911 assures to those entitled to its benefits the same rights as native citizens as regards entry and residence, and

the carrying on of commerce, manufacture, and trade, most favoured nation treatment in the matter of the pursuit of industries, professions, and trade, permission to own and hire premises and warehouses, and to lease lands, to have full access to the law courts on the same conditions as native subjects, and to enjoy exemption from military service, forced loans, and military requisitions, except such as are imposed on native owners of immovable property. The estates of deceased nationals may be administered by consular officers and so forth. These personal privileges as opposed to such privileges as are directly connected with goods such as the duties to be levied on goods on entry are held to accrue to every British subject, wherever he may have been born or be domiciled, even although the Dominion in which he was born or is domiciled may not have been brought under the operation of the treaty at all, as, in the case of the Japanese treaty, is the position as regards Australia, New Zealand, and the Union of South Africa.

There seems at first a very curious anomaly in this position, for reciprocity would seem to demand that if an Australian has a treaty right to settle in Japan, and if on the score of his nationality he has a treaty right to have protection for his industrial property in Japan under the Industrial Property Convention, apart from the fact whether that Convention is applicable to Australia or not, Japanese subjects should have in Australia the same rights. The answer to this argument must be based on the fact tnat the treaties do not contemplate any distinction between British subjects because of their connexion with a Dominion : they merely deal with questions of goods on a geographical basis, and, unlike merchandise, a British subject cannot be expected to have a geographical mark of origin. Moreover, it may be urged, in practice it would be in the extreme difficult to devise any system by which a distinction could be made between classes of British subjects. That of birth is irrelevant for the purpose : if a child is born in England but is taken at an early age to Australia, what better right should it have to entry into Japan than a child born in Australia ? The more

obvious test of domicile would be impossible to work as the domicile of merchants, and more so that of other persons is difficult to decide. If a man has houses of business both in England and in Australia, is his domicile to be decided by the relative importance of these houses or by his domicile as an individual? Moreover, in any case domicile is a matter affording grave room for doubt in any particular case.

Strong as these arguments doubtless are, it is impossible to assume that they can remain permanently satisfactory to foreign governments, if they deem the refusal of personal rights to natives or persons domiciled in oversea Dominions, which stand aloof from British treaties, a matter which is worth while carrying out. While domicile is doubtless not a very easy criterion, it is after all a criterion which has to be constantly applied in the common business of life, and it is perfectly clear that it could be adopted as a criterion if desired by a foreign government. Any theoretic difficulties of this sort can be solved in practice with very little trouble to the government concerned, even if individuals suffer inconvenience. Moreover, it must be remembered that firms and partnerships have often a very definite local habitat, especially if they are formed as companies or partnerships under the law of any Dominion, a fact which at once gives them a local habitat which they cannot deny. It is, of course, possible to argue that the question is one of no great importance for any foreign country, and that various means of evasion might be invented, but none of these considerations would avail to prevent the removal of the present anomaly if any foreign country objected to the one-sided arrangement now in force. It is in this connexion not unimportant that the recent treaty with Switzerland, carried out in accordance with the wishes of the Dominions at the last Imperial Conference, does not permit the retirement of the Dominions from all the treaty of 1855 regulating relations with the Empire, but only from the purely commercial clauses.

While the advantages flowing from British nationality to inhabitants of the Dominions are very considerable, it can hardly be said that British nationality in itself confers

upon any British subject in the Dominions any special rights. The express provisions of the *British Nationality and Status of Aliens Act*, 1914, allow any Dominion or State or Provincial Legislature and Government to exercise any rights they choose in the differential treatment of British subjects, and, unless the wording of the Act is strained, seems even to confer on all aliens a right as to personal property which is not conferred on all British subjects. In point of fact, moreover, it is impossible to deny that the Dominions treat various classes of aliens better than they do British subjects. The European alien is, in Canada and Australasia and in South Africa, treated much better than coloured British subjects, the latter country showing a tenderness towards the speaker of Yiddish which is peculiarly pathetic. It is true that the Privy Council have laid it down that an alien has no right enforceable by law to enter a British Dominion, but the right of the coloured British immigrant is in all the Dominions, save Newfoundland, where he does not want to go, as nugatory as that of the alien, and in point of fact the alien is admitted in many cases freely where the British Indian is rejected. Even the alien Japanese has a distinct preference *de facto* over the Indian in Canada, though it must be noted that this preference is due to the inability of the Government of India to adopt the same rules of restricting emigration from that country as the Japanese Government finds it possible to do in the case of the emigration of her subjects. Nor in any cases is it obvious that the immigrants welcomed by the Dominions are really superior to those whom on colour grounds they reject : the Galicians of Canada are aliens in speech, in race, in religion, in social customs, and in habits, and their competition with Canadian labour is at least as disadvantageous as that of coloured British subjects. The Yiddish-speaking immigrants in South Africa do no credit to the name of European or the alleged European languages which they speak ; years of South African residence and naturalization under the laws of South Africa not rarely leaves them devoid of a word of intelligible English. The conclusion from these facts is not of course

that the Dominions should endanger their racial composition or that they should attempt to mingle European and Asiatic in one community, but that, possessing as they do the principle of racial purity, they should be more particular in choosing the class of European immigrant who is likely to be a real element of value in the future, and should avoid the absurdity of rejecting British Indians, and in some cases European British workers, in favour of persons of inferior race, mainly because they are able to provide for a time cheap sweated labour for the rapid development of industry. In this regard Canada has been the worst offender, with South Africa a good second. The self-respect of Australia has of late years done much to preserve a higher standard of immigration, though the special favour there shown, and indeed generally displayed, to German immigrants, because of the many excellent industrial and agricultural qualities, has by no means always received its due reward in the European War. In Canada, indeed, there is cumulative evidence of open disloyalty among the German communities[1] in the western provinces, and some efforts have been made to promote in the Dominion the same anti-British propaganda which have marked the progress of the War in the United States.

It is doubtless disappointing to realize that there is nothing that British nationality can be said to carry with it as an advantage in the oversea Dominions of the Crown: the protection of the Imperial Government for a British subject is far more effective in foreign countries than it is in the oversea Dominions, as was justly pointed out on several occasions by sympathizers with the British Indians in the long controversy over the rights of such Indians in the Transvaal.[2] It is due to this realization of the little value which attaches in these Dominions to the status of a British subject that feeling in India has turned somewhat strongly against the self-governing Dominions, and it is therefore matter for sincere

[1] Certain German organs of opinion in the West have systematically extolled German and ignored British successes.

[2] e. g. Lord Ampthill, *House of Lords Debates*, July 26, 1910.

congratulation that the service of British Indians side by side with the forces of the Dominions in the European War have enabled the people of these Dominions to realize that there is another side to the people whom they know only in their own countries as undesirable immigrants, whom they seek to deprive of every privilege.

CHAPTER XIII

TRADE AND COMMERCIAL TREATIES

THE development of self-government in the Dominions was greatly promoted by the fact that, at the time when circumstances rendered its concession on political grounds desirable in the interest of the internal order of the colony of Canada, events in the United Kingdom were leading to the introduction of principles of economy which forbade the further preservation of the rule of controlling the trade of the colonies, and counselled leaving that trade to be managed by the Parliaments of the newly established responsible governments. Naturally it was hoped, in the middle of the nineteenth century, that epoch of confidence in the automatic working of economic maxims, that the new countries would realize to the full the merits of the system of free trade, and that they would not dream of imposing upon themselves the fetters of protection. As a matter of fact the new countries in some cases tried free trade, and then decided to fall back on protection, and as early as 1859 the doctrine was expressly asserted by Canada, and accepted by the mother country, that the fiscal policy of a colony enjoying responsible government was a matter for its own discretion. At the same time the rule was still maintained that no discriminating duties were to be imposed on imports, and the constitutional action of New Zealand, and of the Australian colonies, were expressly fettered with this restriction on their powers of independent action.[1] This position was by no means altogether attractive to these colonies when in the process of their growth they desired to effect more close relations in customs matters with each other, and with the colony of New Zealand, and in the years 1869–1873 a vehement

[1] 13 and 14 Viet. c. 59, s. 27, forbad this for Australia and the royal instructions for New Zealand.

discussion arose between the Imperial Government and the governments of the colonies c . this question of differential duties, in the course of which attention was drawn to the undoubted fact that there had been in the days before Canadian federation a number of cases where such duties had been allowed to exist. The Imperial Government were hard to move, but at last they yielded [1] to the extent of allowing the Colonies and New Zealand to arrange for special duties *inter se*, but they declined to extend the practice further, or to permit the conclusion of treaties of commerce between the colonies and foreign powers, or any differentiation in favour of foreign powers by the colonies. The concession thus hardly won was, like many other concessions which have formed the subject of bitter controversy, made no use of by the governments concerned, which turned out to have different interests in the matter, despite the apparent unanimity with which they had handled the matter when it was merely a question of arguments with the hated tyrant, the Secretary of State for the Colonies.

The treaty question having emerged, it was bound to lead to further developments. The initiative came in the main from Canada, where, on the defeat of the Liberal Government which was contented with a low tariff in 1878, Sir John Macdonald came into office with an active policy on tariff matters. Sir A. Galt, sent to London as High Commissioner for Canada, was instructed to open negotiations with foreign countries with a view to enter into tariff agreements with them for the benefit of Canadian trade : the Imperial Government were approached on the question of the negotiations, and they laid down that the negotiations with Spain, which was to be approached at once, should be conducted by the British representative there, who would however be largely guided in his attitude by the views of Sir A. Galt. This was in effect to concede the position as negotiator to Sir A. Galt, and at the same time the consent that negotiations should be opened was an intimation that the old policy of forbidding the imposition of differential duties which was enforced by the

[1] 36 and 37 Vict. c. 22.

requirements in the Canadian royal instructions against the grant of assent to any such Bill, would not be adhered to. In 1883 this fact was frankly admitted in correspondence with the Government of the Dominion, and in 1884 the further point, mainly one of form, was conceded, and Sir Charles Tupper, now High Commissioner in London, was allowed to act not merely as adviser in negotiations, but also as negotiator, though his efforts at that time were not successful in bringing about any treaties. In 1893, however, he had the pleasure of succeeding in bringing about the signature of a treaty of commerce with France, regarding the commercial relations of Canada: he signed this treaty in conjunction with the British Ambassador and Sir Joseph Crowe, who had been associated with the Ambassador in the negotiation of the treaty: in point of fact, however, the main work of the negotiation was that of the High Commissioner, who was however aided by Sir J. Crowe throughout, and especially in the fact that the latter was a fluent speaker of French, which the High Commissioner was not.[1]

Moreover, it became clear that it was no longer possible, in view of the attitude of the Colonies, to continue the practice of making commercial treaties binding on the Empire as a whole. The practice was therefore introduced of making treaties subject to a clause providing that they should only become applicable to the self-governing Colonies on notice being given within a period of one or two years: the first treaty actually so concluded seems to have been one with Montenegro of January 21, 1882. It was not always possible to secure the agreement of foreign powers to such a limitation, and thus the Anglo-French treaty of 1882 ignores the Colonies, but from that date no treaty made with a foreign power on commercial matters has ever bound a self-governing Dominion without its consent. It followed, however, that it was anomalous that the Colonies should remain bound by treaties with regard to which they had never been consulted at all, and the difficulty of these treaties was increased by the desire of Canada to arrange preferential trade with the United

[1] See Sir C. Tupper, *Recollections of Sixty Years*, pp. 174, 175.

Kingdom. It was early realized in the examination of the matter that the treaty of 1862 with Belgium, and that of 1865 with the North German Confederation, were fatal to any such proposals, for they made it clear that any concessions given by any government in the Colonies to the Imperial Government would have to be accorded to these two countries, and therefore of course to all countries having most favoured nation clauses in their treaties. It had been formerly the practice of the Imperial Government to press for the inclusion of such clauses in British treaties, and it was therefore the case that quite a number of such treaties of importance existed.

These circumstances led to an elaborate discussion of the whole position as to the possibility of closer union among the several parts of the Empire as regards trade questions at a Conference held at Ottawa in 1894,[1] which was nearly though not entirely representative of the whole of the self-governing parts of the Empire. The Conference represented that it was desirable to establish preferential trade among the various parts of the Empire, and that pending such time as the United Kingdom might adopt this policy the self-governing Colonies should be allowed to enter into closer relations in this regard, and that for this end the treaties with Belgium and Germany should be got rid of so as to permit of the giving of preferences to other parts of the Empire and the United Kingdom. The reply[2] of the Imperial Government was that they were not prepared to adopt preferential trade within the Empire as a desirable course of policy, as it was contrary to the natural movement of trade, and threatened even apart from foreign retaliation no clear advantages, that they would withdraw all objections to differential duties among the Colonies generally, and for that purpose had procured the repeal of the Imperial Act[3] imposing restrictions on the Australian Colonies in this regard, and that the treaties in question, as they did not prevent the grant of intercolonial preference or preference by the United Kingdom to the Colonies, and

[1] *Parl. Pap.*, C. 7553. [2] *Parl. Pap.*, C. 7824.

[3] 36 and 37 Vict. c. 22, repealed by 58 and 59 Vict. c. 3.

as the United Kingdom did not desire a preference in the Dominions conditionally on their denunciation, were not in their opinion suitable for denunciation, especially as the denunciation might involve serious losses on the Colonies, since there was a large export trade to Germany and Belgium in colonial produce such as wool.

At the same time the Imperial Government intimated their views on the question of the possibility of the making of separate commercial arrangements with foreign powers as regards the trade of the Colonies. They insisted on the principles that a treaty must be between sovereigns, that the Imperial Government must be the channel through which a treaty must be negotiated, as the Imperial Government was the Government to which any demand for redress must be made, that to give the colonies powers of independent negotiation of treaties would be to give them an international status as separate and sovereign states, and would be equivalent to breaking up the Empire into a number of independent states, a result equally injurious to the Colonies and to the mother country, and desired by neither. Any negotiation therefore must be conducted by His Majesty's representative at the foreign court, aided by a colonial representative as a second plenipotentiary or in a subordinate capacity as might be considered desirable in each case, and any treaty concluded would have to be subject before ratification to the approval of the Imperial Government, the Colonial Government and the Colonial Parliament, if legislation were made requisite by its terms before ratification could take place. At the same time the terms on which such negotiations could be carried on were explicitly set out: in the first place the concessions made to any foreign country must be made also to any other foreign country entitled by treaty to most favoured nation rights in the Colony, and the Imperial Government would require to be satisfied of the due passing of any necessary legislation before they could ratify a treaty; in the second place any concessions to foreign powers, and therefore also to any foreign nation with a most favoured nation treaty, must be extended without compensation to the whole of the British

possessions, since it was not to be supposed that any Colony would wish to prefer foreigners to British subjects: in the third place no concession could be accepted from a foreign power which would be disadvantageous to another part of the Empire: if a concession were sought which might have this character, the Imperial Government would feel bound to endeavour to secure the extension of the concession to the other parts interested, and, if this were impossible, unless the other part were indifferent to the concession, it would be doubtful if it could be proceeded with. These rules were enforced by arguments drawn from the unity of the Empire, and the isolation and political attraction to a foreign community which might result from the establishment of close relations between one community and a foreign country. It was also pointed out that in 1892 Canada had refused to discriminate in favour of the United States against Newfoundland, and in return had been assured that the Imperial Government would not allow that Colony to discriminate against Canada.

The advent to office of the Conservative Government in 1895 was followed by the adoption of a more yielding attitude in regard to the two treaties with Belgium and Germany. After the Colonial Conference of 1897 [1] the insuperable objections hitherto urged to any alteration in this regard were waived, and the two treaties were denounced. The action was made the more needful since the Liberal Government in Canada was pressing forward with proposals for Imperial preference, and all attempts to evade the effect of the treaties was clearly futile. The result of the denunciation in the case of Germany was, however, as had been predicted, the attempt [2] of Germany to injure Canadian trade by the refusal to accord to that trade the same terms as were accorded to British trade generally, and in 1903 Canada definitely retaliated against this policy and imposed a surtax of a third on German imports.

It was inevitable that, once the question of permitting the withdrawal of the Colonies from treaties was raised, the older practice by which treaties were concluded with pro-

[1] *Parl. Pap.*, C. 8596. [2] *Parl. Pap.*, Cd. 1630.

vision for separate adherence in respect of the Colonies, but without provision for separate withdrawal, should be revised, and the first-fruits of this revision were seen in conventions with Uruguay in 1899, and Honduras in 1900, permitting the withdrawal of any British possessions from the operation of the treaties of 1885 and 1887 with these countries. Further impetus to this proposal was given at the Colonial Conference of 1902,[1] when a resolution was passed in favour of the examination of the navigation laws of the Empire and other countries, and the desirability of closing coastwise trade, including trade between the United Kingdom and the Colonies, to those countries which closed their trade to British vessels. The resolution was taken seriously by New Zealand which legislated in 1903, taking power to close the coasting trade to countries which closed it to British ships, and as this clause would have run counter to the treaty with Greece of 1886, new agreements of November 10, 1904, and May 4, 1905, were negotiated by which the right to withdraw the self-governing Dominions and other possessions from the treaty was secured. The passing of a Bill by the Commonwealth Parliament in 1906, which proposed to give a preference to British goods imported in British ships manned by white labour raised new treaty problems in its restriction of the right to British ships, and on the advice of his Ministers[2] the Governor-General reserved the Bill. It was fairly clear that the measure contravened the treaties with Austria-Hungary of 1868, that with Italy of 1883, with Russia of 1859, and perhaps those with Egypt, Greece, Morocco, Colombia, Salvador, Honduras, Paraguay, and Liberia. The result of the discussion of the question at the Colonial Conference of 1907,[3] when the Imperial Government in clear terms intimated its inability to accept a preference given on conditions which penalized British Indian subjects, was that the preference actually accorded in 1907 was not hampered by any reference to the mode in which the goods were imported.[4]

[1] *Parl. Pap.*, Cd. 1299. [2] *Parl. Pap.*, Cd. 3339. [3] *Parl. Pap.*, Cd. 3523.

[4] Canada has power to close her coasting trade *in toto*, and freely exercises it.

It was nevertheless still desirable in the eyes of the Commonwealth and the other Governments concerned to proceed with the question of freeing the self-governing Dominions from the ties of old treaties which had been entered into before the new régime regarding the autonomy of the Colonies in commercial matters, and in accordance with this view, which was reinforced in 1911 by the Imperial Conference of that year, a long series of treaties has been concluded which permit the King to withdraw from the old treaties in respect of any one of the self-governing Dominions on giving a year's notice of intention, without affecting the validity of the treaty as regards the other parts of the Empire. This concession was made by Egypt in 1907, by Liberia and by Paraguay in 1908, while the treaty with Salvador was denounced by that Republic and ceased to matter. In 1911 the consent of Sweden to the proposed arrangement was obtained, followed in 1912 by the consent of France in respect of an old treaty of 1826, of Denmark, and of Colombia, in 1913 by agreements with Norway and Costa Rica, and in 1914 by one with Switzerland. The treaties with Austria have been brought to a termination by the operation of the war, and the only [1] treaty of outstanding importance which remains unassailed is that with Italy of 1883, and in this case it must be remembered that the colonies to which it applies became parties to it by their full assent, and that they are under the same difficulties with regard to it and no other as the United Kingdom. All modern treaties, such as those with Nicaragua, Rumania, and Bulgaria, of 1905, with Serbia of 1907, with Montenegro and Honduras [2] of 1910, and with Japan of 1911, contain clauses providing for separate adherence and separate withdrawal in respect of the British possessions generally. But as has been seen above, even in cases where the Dominions are not included in the operation of the treaty by adherence in respect of them, the personal rights flowing from the treaty are claimed by the British Govern-

[1] That with Russia of 1859 is of less consequence.

[2] Ratified only in 1915; see *Parl. Pap.*, Cd. 7964.

ment to belong to the status of British subjects *per se*, and not to be affected by the fact that a British subject is born in or domiciled in or carries on business in a part of the Empire to which the treaty is not applicable, and this claim has not hitherto been effectively disputed by any foreign country except Switzerland.

At the same time there has been a marked development in the question of the making of commercial agreements separately for the benefit of the self-governing Dominions, and this in two rather different ways. In the first place, the doctrine of formal negotiations through the medium of the ordinary diplomatic channel has been developed in detail. In a dispatch of July 4, 1907,[1] Sir Edward Grey intimated to His Majesty's representatives at Paris and Rome the wish of the Canadian Government to initiate negotiations with the French and Italian Governments for the conclusion of more intimate commercial relations between Canada and these countries. He recalled the conditions as to such negotiations laid down by the Imperial Government in their reply to the resolutions of the Ottawa Conference in 1895, but stated that he did *not consider* it necessary to adhere in the present case to the strict letter of the regulations then laid down, the object of which was to secure that the negotiations should not be entered into and carried through by a colony unknown to and independently of His Majesty's Government. The selection of the negotiator was principally a matter of convenience, and in the present circumstances it would obviously be more practicable that the negotiations should be left to Sir Wilfrid Laurier and to the Canadian Minister of Finance, who would doubtless keep the British Chargé d'Affaires informed of their progress. If the negotiations were brought to a conclusion at Paris he was to sign the agreement jointly with the Canadian negotiator, who would be given full powers for the purpose. In accordance with this arrangement the treaty was negotiated in Paris and finally approved after it had received the careful consideration of the Imperial Government, the

[1] *Parl. Pap.*, H. C. 129, 1910.

signature being deferred until that consideration had been accorded:[1] the signatures appended were those of the British Ambassador, Mr. Fielding, and Mr. Brodeur, both ministers of Canada. In 1909, in view of the failure of the Convention of 1907 to secure the acceptance of the French Chambers, Mr. Fielding visited Paris and engaged in confidential discussions with the French Government, which resulted in the preparation of a draft convention excluding from the benefit of the French minimum tariff fat cattle in condition for butchering, the French agrarian interest having blocked the passage of the treaty into effect on account of this concession. The draft was prepared and sent by the Foreign Secretary to the British Ambassador with authority to sign jointly with Mr. Fielding. In this case again the proposed change had received the most careful consideration from the British Government. So also in 1911[2] and 1913 respectively, the arrangements regarding trade between Japan and Canada were concluded by Sir E. Grey on behalf of the Crown, although the terms of both had formed the subject of discussion between the Canadian Government and the Japanese Consul-General at Ottawa. In both cases, of course, the treaty was subject to the fullest consideration at the hands of the Imperial Government before it was concluded.

Ample as these arrangements seem to be for the purpose of securing the wishes of the Dominion being given full effect some discontent was expressed in Canada, and in debate in the House of Commons on February 21, 1908, it was contended that the power of making treaties independently should be conferred on the Dominion, a proposal which Sir Wilfrid Laurier declared to be unnecessary as the existing arrangement worked well. In 1910 a step of some consequence was taken by Canada which deviated somewhat from the precedents of commercial treaties. The action of Germany in penalizing Canada for her British preference had been resented in Canada, and retaliation had been imposed in 1903. Germany had come to be wearied of the struggle,

[1] See below, p. 274.

[2] *Parl. Pap.*, Cd. 5734.

and the German Consul-General at Montreal was empowered to propose that, in return for the concession of Germany's conventional tariff on those Canadian imports which mattered to Canada, Canada should revoke the surtax on German imports. The agreement was concluded direct between the Consul-General and Mr. Fielding on February 15, 1910,[1] and was carried into effect by Order in Council remitting the surtax, as was possible under the existing legislation of the Dominion. As the Order in Council received the assent of the Governor-General, it was, of course, not beyond the power of the Imperial Government to intervene in the matter, but the full control exercised when the negotiations were placed formally on record in the form of a treaty was not possible. This was followed by further cases of informal arrangement, but in this instance the proposal for such negotiations came through the British Embassy at Washington: the tariff of the United States as amended provided that the minimum tariff could be granted to countries which did not discriminate against the United States, and the question had arisen whether the effect of the convention with France, which had to extend automatically to all countries with most favoured nation rights, did not constitute an undue discrimination against the United States. The position of the States was not in equity a strong one, but it was felt desirable by Canada to meet their views, and the promise was made of legislation to lower the duties on certain articles which had been included in the Anglo-French convention. No treaty was signed, but both sides took the necessary action, Canada by an act which lowered the duties on these articles to the whole world. Later in the year an agreement was made with the Royal Consul of Italy regarding Italian trade, and concessions were made to Belgium and the Netherlands without asking for any return. In all three cases Orders in Council were issued, on June 7, 1910, and so, as in the case of the concessions to the United States, the action taken was not without opportunity of objection on the part of the Imperial Government.[2]

Little comment was made on these agreements in the

[1] *Parl. Pap.*, Cd. 5135.

[2] *Parl. Pap.*, Cd. 5582, p. 9.

United Kingdom, but in January 21, 1911,[1] an agreement was reached between Messrs. Fielding and Paterson on behalf of the Government of Canada, and the United States Secretary of State, which proposed that a large programme of reciprocal lowering of duties should take place between the two countries in order to promote freer trade, especially in natural products, the great question of the entry of fish to the United States being disposed of on the basis of free entry of fresh fish in either case and of preserved fish on a low basis of duty. The published correspondence shows that the proposal was based on discussions which had taken place in February 1910, between the representatives of Canada and the United States, when discussing the question of the admission of Canada to the minimum tariff of the United States. It was proposed in May 1910 by the United States Government through the British Ambassador to renew the discussions at that time, but this could not be arranged as the Canadian ministers were separated, and Mr. Fielding had gone to England. On January 6, 1911, however, the Canadian ministers, Messrs. Fielding and Paterson, appeared at Washington, and were introduced to the President and the Secretary of State of the United States. The discussions with the United States Government were carried on direct, but the Ambassador was in constant communication with the Canadian ministers. Unexpectedly the negotiations, which had been expected to be of somewhat limited type, resulted in the arrival at a very striking amount of agreement, and on January 19, Mr. Bryce could telegraph that the negotiations were well advanced: on January 22, he was able to send the substance of the agreement concluded. No formal treaty was arrived at: the proposals made were for concurrent legislation, and, unlike a treaty, no fixed time was prescribed for the continuance of the arrangement, which thus resembled rather an agreement on policy carried into detail than a treaty proper.

In sending the text of the arrangement on January 22, the Ambassador expressed the opinion that British interests were

[1] *Parl. Pap.*, Cd. 5382, p. 9 and 5523.

not to any appreciable extent prejudiced and stated that he had the assurances of the Canadian ministers to this effect. No opportunity was lost in the course of the negotiations of reminding them of the regard which it was right and fitting they should have to Imperial interests, while doing their best for Canada, and such reminders had received a frank and cordial response. The arrangement rested on a realization of the fact that a high tariff wall between contiguous countries whose products were economically interchangeable was an injury to both, and opposed to sound fiscal principles. This was specially so in the case of food tariffs, with which the agreement chiefly dealt. The arrangement would probably be justified and defended in the United States as an outcome of the traditional policy of increasing the economic relations between the States of the western hemisphere, but this policy has no influence, either in the states of America or in Canada, on the sense of nationality and international importance, and there was no likelihood that a freer interchange of commodities would lead to closer relations of a political kind. The Ambassador also noted that in some cases the duties charged on Canadian imports into the United States would be less than those on British imports, but he had the assurance of Canadian ministers that the British imports would not suffer from this fact.

The result of the negotiation was embarrassing to the Imperial Government, which had, it is clear from the published papers, no really effective chance of controlling the negotiations. A good deal of blame was in some quarters attributed to Mr. Bryce[1] for his share in the matter, but no accusation, it is clear, could have been more unjustly made. It is obvious that Mr. Bryce was in the very difficult position of being unable effectively to control negotiations carried on by the United States Government in close relation with the Canadian ministers, and at so rapid a pace that no time was allowed for full effect being given to any views which he might wish to offer. It appears indeed from the correspondence that he was very imperfectly informed of the details of the scheme,

[1] Cf. *House of Commons Debates*, May 6, 1912.

and had not the full result in his hands before signature. It is idle to blame an ambassador in these circumstances: his mission was one of settling the many outstanding difficulties which existed between the United Kingdom and the United States, and no useful purpose would have been served by any effort of his to insist on a more leisurely mode of carrying on the negotiations. Indeed, as Sir E. Grey pointed out in his defence, the only result of his interference would have been to stimulate the demand for the concession to Canada of the treaty power.

At the same time it was perfectly clear that the spirit and manner of the conduct of the negotiations departed seriously from the spirit laid down in the dispatches of 1895, and from the procedure followed in 1907 and 1909. In both the cases in question the negotiations had been, before a treaty was signed, carefully scrutinized by the Imperial Government; the assertion[1] that this was not the case is a complete blunder: indeed the scrutiny was with effect for British interests. In 1911 the agreement was concluded with all regard, no doubt, for such interests, but by two ministers of Canada, who could not know what Imperial interests really were involved. No one could doubt the patriotism of Mr. Fielding, or his devotion to the interests of the Empire as well as of Canada, but his wide knowledge of Canadian agriculture and industrial conditions was not accompanied by any similar knowledge of conditions in the United Kingdom, and the result was, therefore, that a treaty was negotiated which could be fairly argued to be likely, by promoting extremely close relations economically between the United States and Canada, to attract Canada into the influence politically of the United States. It was the exact danger which had been foreseen by the Imperial Government in 1895, and it arose because of the regrettable deviation from the actual principles laid down by that Government, and never relaxed by the Imperial Government. The actual preference to the goods of Canada which would have been accorded by the United States over other British goods was probably not a very serious matter,

[1] Mr. A. J. Balfour, *House of Commons Debates*, July 21, 1910.

though even that was denied by tin plate manufacturers, but the broad fact was that the result of the negotiation was to realize the ideal of continental free trade which had been an aim of the Liberal party in Canada, and which had, in 1891, led to the resignation of the Hon. Edward Blake, as he felt that it might not be compatible with the autonomy of Canada and the integrity of the Empire. The situation was rendered more difficult by the imprudence or candour of the President of the United States,[1] who gave it to be understood that he considered that the policy would tend to lead Canada into political union with the United States of America. The same warning was given by leaders of the Conservative Party in the Dominion, who felt that the old policy of Sir John Macdonald was being cast into jeopardy, and that the time had come when they could attack the Government on a broad national as opposed to mere party issues. The Opposition had the support in this movement of the great manufacturing industries of Ontario, who held that there was risk of their ruin under the influence of the influx of cheaper goods from the United States, while many were troubled by reason of the obvious injury which the agreement would inflict on the British preference and the British connexion, even assuming that no political ill results were to be feared. The result was the complete overthrow of the Liberal Government, after it had failed to pass the amendments of the tariff necessary to carry the agreement into effect, and after it had decided, in response to the challenge of the Opposition, to obtain the ratification of its policy by the people of the Dominion. Parliament was dissolved without the necessary supply being obtained, and the general election of September 21, 1911, returned a majority of forty-five members for the Opposition in place of a majority of forty-one: eight ministers were defeated, and the loss of the leaders of the Liberal Party was so overwhelming, that the Prime Minister, who resigned office without meeting Parliament, decided that he must assume the burden of leadership in opposition, though he had decided before the election to retire from politics if his Government

[1] Cf. Sir C. Tupper, *Recollections of Sixty Years*, pp. 172, 306.

were overthrown. The main cause of the victory was the feeling in Ontario, where the Opposition won six-sevenths of the seats, that the American manufacturers would capture the Canadian market; the loyalty of the Maritime Provinces, where the Opposition greatly improved their position, and of British Columbia, where no Liberal could obtain a seat; while the popularity of the policy of free entry of agricultural products into the United States was seen in the middle provinces, the Government improving its position in Manitoba, Alberta, and Saskatchewan. It must, however, be remembered that in these provinces there is not merely a strong non-British European element, but there is also a very marked American influence, derived from the migration of men from the United States, attracted by the rich lands opened to settlement in the prairie provinces and urged on by the comparative lack of equally attractive land in the United States. The result was, it is clear, the best vindication of the principles laid down in 1895: had they been observed, there would have been no risk of the conclusion of a treaty which would have endangered the political allegiance of Canada. It is fair in examining the situation, to realize that the Canadian delegates went to Washington with no very clear idea[1] that there was much to be attained, and that the proposals of the President, who took the matter largely into his own hands, were rather a surprise to them. The action of the President was, it is clear, based on the fact that his party were in desperate need of some means by which they might diminish the very high protective tariff which they had secured in 1909, without, at the same time, abandoning the principles for which they had fought in that year. Had they been able to secure the passing into force of the agreement with Canada, they would have lowered the highest and most serious of the burdens on the American consumer, and they would at the same time have been able to point to their action, as the President did point to it, as motived by high political no less than economical considerations.

Whatever the cause, there has been, since the fiasco of 1911,

[1] *Parl. Pap.*, Cd. 5523, p. 3.

no further attempt in any Dominion to arrange serious commercial negotiations on any independent basis. On the other hand, a very important innovation has been arranged in very recent times, and one which reflects the growing importance of the Dominions. It has long been the practice of the self-governing Dominions to send representatives to a vast mass of miscellaneous congresses on every conceivable sort of social question,[1] but these congresses were not such as directly to produce political results, and therefore no question of treaty-making arose. It was, and is, therefore, possible for governments like the states of Australia and the provinces of Canada, which have no international status at all, to take part in these congresses. On the other hand, where an international agreement was to result, it used to be the invariable practice that the Dominions should not be represented at all, or that at most they should be included as advisers in the representation of the Imperial Government. Of the latter mode of procedure an excellent instance is that of the International Conference of June and July 1911, at which the representatives of the United Kingdom, the United States, Japan, and Russia devised a system of protection for fur seals which it was hoped later to extend to other countries: at this Conference the Canadian Under Secretary of State for External Affairs was associated with the other British representative, Mr. Bryce. On the other hand, in the case of the International Opium Conference convened at The Hague at the end of 1911, the labours of which resulted in an important convention, signed on January 23, 1912,[2] though the Dominion Governments were invited by the Imperial Government to send representatives to assist the Imperial representatives, they thought it needless to do so. The convention was, therefore, not signed by the British delegates on behalf of any Dominion, but the power was reserved to sign separately in respect of any Dominion, colony, possession, or protectorate, and the assent of the self-governing Dominions to the signature of the convention in question was obtained in the course of 1912.

[1] See, e. g., *Parl. Pap.*, Cd. 6863, pp. 7, 8; 7507, pp. 8, 9.

[2] *Parl. Pap.*, Cd. 6038.

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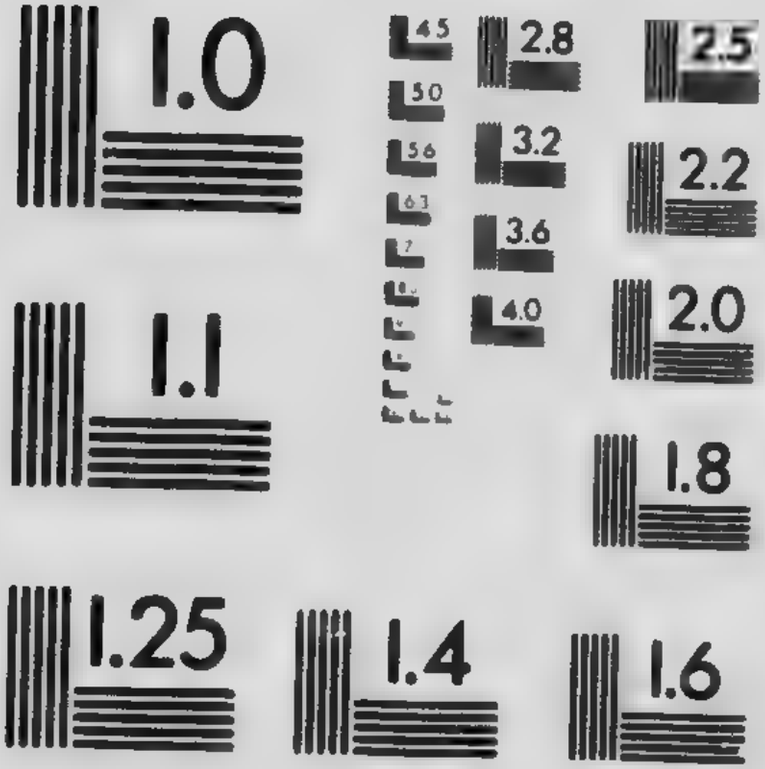

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A new procedure was, however, to appear. In July 1911 an international conference was summoned by the United States Government to be held at Washington for the revision of the International Convention respecting the protection of industrial property, and the arrangement for the prevention of the false indication of origin upon goods. A special invitation to be present at the Conference was sent [1] to the Government of Canada through the usual channel, the Ambassador at Washington and the Governor-General. The Conference resulted in a convention, but the delegates sent by Canada were unable to see their way to agree to the convention, and therefore the difficult question of their status and position never arose. The difficulty was one under the constitution of the existing international convention which made no provision for the separate representation of the Dominions, but elasticity of international arrangements is shown by the fact that the United States gave the invitation, and it was not in the interest of any power to question the presence of the Canadian representatives. The British delegates, however, not only secured the usual power to adhere or withdraw from the convention in respect of the British possessions of every kind, but they made a formal declaration that certain British Dominions, which adhered to the convention, and which possessed legislative authority on the subject of industrial property, should be represented at the Conference of the International Union by delegates who should have the same right to vote as was accorded to the delegates of contracting countries, it being understood that the Dominions would contribute in the same manner as other unionist states to the expenses of the international bureau.

A further step in progress was taken in the following year. It became desirable to convene an international radio-telegraphic conference at London, and the question of the position of the representatives of the self-governing Dominions at once arose. Already in the case of Postal Conferences, it had been found possible to secure certain votes for the British Colonies, and in 1906 [2] the self-governing

[1] *Parl. Pap.*, Cd. 5842.

[2] *Parl. Pap.*, Cd. 3556.

Dominions, except Newfoundland, were represented by delegates appointed by their governments and not included in the British delegation. These delegates were thoroughly anomalous in status. They did not act, as has been supposed,[1] under the authority of the appointment of their local governments only: to avoid trouble arising, each colonial delegate was presented with a curious document, signed by the Secretary of State for the Colonies, purporting to confer on him full power to act in the matter. The procedure was in every way undesirable: the British delegates also had not full powers, but authority from the Postmaster-General, and the arrangements arrived at were not ratified but approved, and confirmed by the administrations concerned. The anomaly of the colonial delegates' position was thus lessened, but the whole plan of action seems to be badly arranged.

At any rate, the same mode of action was not followed in the case of the Radio-telegraphic Conference: the four great self-governing Dominions were each represented at it by delegates who carried with them as their credentials full powers[2] under the great seal of the United Kingdom, differing only from the full powers granted to the Imperial delegates in having the words 'on behalf of the Dominion of Canada', or as the case might be, added after the words 'Commissioner, Procurator and Plenipotentiary'. The excellent precedent thus set was followed less than two years later when, at the International Conference[3] on the safety of life at sea, held at London in December 1913 and January 1914, the self-governing Dominions of Canada, the Commonwealth of Australia, and New Zealand were all represented by plenipotentiaries.

The essential difference from the new as compared with the old practice lies of course in the fact that the plenipotentiaries of the Dominions are now no longer merely plenipotentiaries

[1] J. S. Ewart, *Kingdom Papers*, ii. 234.

[2] See the extract from the full powers in Ewart, *Kingdom Papers*, ii. 235.

[3] *Parl. Pap.*, Cd. 7426. Ewart, *loc. cit.*, is misinformed as to the position of the Canadian delegate.

for the United Kingdom. In the case of their being included in the British delegation, the vote of the British delegation must be cast in the same sense,[1] whatever the views of the different members: in the case of separate plenipotentiaries the votes of the several plenipotentiaries might be very differently cast. This involves, of course, the curious position that His Majesty may through one set of plenipotentiaries declare one view and, through another, another view, but it is merely a common-sense recognition of the diversity within the uniformity of the Empire. It is no more curious than the existence of independent governments within the Empire pursuing different policies in many respects. Nor must it be ignored that the grant of full powers is advised by the Imperial Government, and that the ratification of any convention rests with the King on the advice of the Imperial Government. Thus the Imperial Government retains an effective means of control on the action of the Dominion Governments, however little such control may be likely to be required.

[1] In a case in 1883, on a conference on submarine cables, Sir C. Tupper opposed the other British delegates and induced them to accept his view. *Recollections of Sixty Years*, p. 175.

CHAPTER XIV

POLITICAL TREATIES.

From the political point of view, few points remain doubtful in the rules regarding the treaty power. It is at present settled law that a treaty proper can be made only by the Crown on the advice in the long run of his Imperial ministers, that responsibility for the carrying out of treaty rests on the Imperial Government, to which demands for redress must be sent by foreign powers, and that the mere making of a treaty has no effect to alter the law of the United Kingdom or any Dominion. The Imperial Government, therefore, if it makes a treaty, must be prepared to secure that the treaty shall be put into force, and to interpret the treaty unless it is required or induced by the other party to submit the meaning of the treaty to arbitration. But the main duty of dealing with treaties which affect a Dominion must lie with a Dominion, and any treaty which requires action by a Dominion has normally been made subject to legislation therein, as in the case of the treaties with the United States affecting fishery matters in Canada in 1854 and 1871, as well as the abortive treaty negotiated by Mr. Chamberlain in 1888 and the agreement made by the Canadian ministers and the United States Secretary of State on January 21, 1911, which never came to fruition. The theory that none but a sovereign legislature and executive can deal with any matter affecting treaty rig as nevertheless actually put forward by the Government of the United States in 1886, when that Government was annoyed by Canada, but was at once refuted by the British Government, and Mr. Bayard, who put it forward,[1] is shortly afterwards to be found writing to Sir C. Tupper[2] expressing his regret at the troublesome procedure of not

[1] *Parl. Pap.*, C. 4937, p. 37. [2] *Recollections of Sixty Years*, p. 177.

dealing direct with Canada on the matter. A similar protest against colonial action in 1891–2 by the French Government in connexion with Newfoundland was met by a similar reply,[1] and the Hague arbitral tribunal of 1910, in settling the fishery dispute between the United Kingdom and the United States, provided for the case of the carrying out of British legislation by the Imperial Parliament and the Parliaments of Canada and Newfoundland.[2]

The question has been raised in the Dominions, by no less a person than the present Prime Minister of Canada,[3] whether any treaty which requires legislative action to make it effective should not be expressed to be subject to the approval of any Parliament whose action would be concerned. The circumstances of the case on which his remarks were based were, however, very exceptional in international relations. In the United States the treaty-making power is vested in the President of the United States, and until the Senate approves a treaty it is contrary to practice that its terms should be published, though *de facto* the treaty is printed in all the newspapers from a copy lent by some Senator. This happened in the case of the Treaty of 1909 with the United States regarding boundary waters, which was published in the United States at a time when the Canadian House of Commons had been unable to obtain any details of its terms. The occasion was made a ground of complaint against the theoretic ignoring of Canada in the negotiations. Mr. Borden thought that by making treaties subject to parliamentary ratification such an incident would be avoided, but it does not appear that this would in any way be the case, so long as the United States Government continue to refuse official publication before consideration by the Senate, and so long as the Senate allows the treaties submitted to it to be divulged. The rest of Mr. Borden's speech of May 14, 1909, was devoted to showing the necessity of legislation to give effect to the treaty in question, the desirability of ratification being made subject to Parliamentary approval, and the enumeration of cases

[1] *Parl. Pap.*, C. 6703. [2] *Parl. Pap.*, Cd. 5396.

[3] Canada *House of Commons Debates*, May 14, 1909.

where treaties had been expressed as not taking effect unless legislation should be passed. His arguments, however, are not altogether convincing, if it is remembered that a treaty must be ratified, and that it is easy enough to secure discussion of a treaty before it is ratified, and that such a practice has grown up in the United Kingdom, where even if legislation is not required before ratification opportunity is given to allow of discussion, while if legislation is needed it is duly introduced and carried before ratification is accorded, as was the case with the *Copyright Act* of 1911, passed in order to allow of ratification of the Berlin Copyright Convention of 1908. Whether it is worth while making the treaty formally dependent on parliamentary approval, as in the case of the cessions of territory in the Anglo-German Treaty of 1890[1] and the Anglo-French Treaty of 1904,[2] is in the main a matter of form. The important part of the question is the securing of parliamentary approval[3] and the closer control of the treaty power by Parliament, of the value of which a striking instance has been given by the European War, which vindicates the action of the Upper Chamber in rejecting in 1911 the Bill which would have enabled the Government to ratify the unhappy London Convention regarding naval warfare.

The ultimate right of the Imperial Government to interpret treaties was contested very bitterly at various times by Newfoundland, but the Imperial Government have twice asserted their right in a convincing manner. On the first occasion, an episode in the long discussion over the French fishery rights in the colony,[4] the Newfoundland delegates would not yield to the views of the Imperial Government until not only was a *modus vivendi* with the Republic passed over their heads, but the Imperial Government, having enforced it without legal authority, and having thought it

[1] 53 and 54 Vict. c. 32. [2] 4 Edw. VII, c. 33.

[3] So in 1914 the Act 5 Geo. V, c. 1, was obtained to allow of the ratification of the Portuguese treaty of Aug. 12, 1914. In 1911 the *Geneva Convention Act* was passed to allow of adherence in full to the Convention of 1906 regarding the Red Cross.

[4] *Parl. Pap.*, C. 3703; *Baird* v. *Walker* [1892] A.C. 491.

best to compensate those whose property they had interfered with, brought a Bill forward which would have settled the dispute in their favour. In the second case, that of the dispute over the American fishery rights in Newfoundland in 1905–7, the resistance of Newfoundland went so far as to leave no option to the Imperial Government but to override the legislation of the Colony by an Imperial Order in Council of September 9, 1907, made under the powers conferred by the old Act of 1819, which was passed in order to enable the Crown to carry into effect the Treaty of 1818 regarding the American fishery rights in the waters of North America. The resentment of Newfoundland against the United States arose from the failure of the United States Senate to ratify the treaty which was arranged between Sir R. Bond and Mr. Hay in 1902 and concluded by the British Ambassador at Washington. That treaty, which was marked by the extraordinary provision that Newfoundland bound herself to give the United States national treatment in regard to all imports whatever, was blocked in the Senate by Senator Lodge on behalf of the interests of the New England fishermen, and in retaliation Sir R. Bond began an energetic policy of enforcing in the strictest manner possible the laws in force against American fishermen, and secured the passing of a further Act, in 1905, under the terms of which extensive powers of boarding and bringing into port for examination foreign fishing vessels were conferred on officers of Newfoundland, and it was enacted that the presence on board such a vessel of caplin, squid, or other bait fish, ice, lines, seines, or other outfit, should be presumed to show that they had been purchased within the waters of Newfoundland, it being, under the Bait Act of 1887 of the Colony, an offence to make any such purchase. These provisions were much resented by the Government of the United States, and the situation assumed an appearance of considerable gravity, which was complicated by the fact that the Newfoundland fishermen were, in many cases, most anxious to remain on friendly terms with the Americans who employed them to catch fish for them.

[1] *Parl. Pap.*, Cd. 3262 and 3765.

thereafter selling the fish thus caught in the United States as American caught fish, and so passing them through the customs free of the heavy duty levied on Newfoundland fish. The situation was composed at last by means of a *modus vivendi* after every effort had been made in vain to induce the colonial government to agree to terms pending the reference of the dispute to arbitration, which the Secretary of State for Foreign Affairs had undertaken to arrange. As the Newfoundland Government would not yield and, as it would have been disastrous to allow strife to occur in the period before arbitration, a *modus vivendi*[1] had to be concluded over the head of the Government, and to render it effective it became necessary to override the law of Newfoundland. The period when action became unavoidable was in September 1907, when no meeting of Parliament was possible, and it was therefore necessary to resort to the powers given in the Act of 1819. In accordance with these powers an Order in Council was therefore issued, the effect of which was to forbid the boarding and bringing into port of an American fishing vessel in the exercise of the treaty right, to put the onus of proof of purchase in the limits of Newfoundland of bait, &c., on the person alleging such purchase, and not on the ship, and to forbid the serving of process on American ships or the seizure of ships or gear without the consent of the senior naval officer on the Newfoundland station. The effect of the Order was admitted by the Government of Newfoundland protested, [illegible] arguments adduced by the Secretary of State were so convincing that there was not even a discussion in the Imperial Parliament on the subject: it was felt in Canada, as elsewhere, that the deliberate plan of endeavouring to annoy the United States when arbitration had been agreed upon was not one which could be supported, and the correspondence published showed that every effort had been made to bring about an agreement between the two Governments, and that no failure of communicating with the Colony at every stage had occurred. Indeed, the *Times*, never inclined to regard with approval overruling of colonial

[1] *Parl. Pap.*, Cd. 3754.

governments, was constrained to express approval of the attitude and action of the Government. Nor did any of the other Dominions endeavour to intervene in support of Newfoundland; the exposition of affairs given was clearly convincing to these governments also, and, indeed, it is well known that Canada was unable to sympathize in any way with Sir Robert Bond.

While in political matters treaties have never been to the same degree subject to the control of the Dominions as in commercial matters, it would be a mistake to imagine that there has ever been any tendency since the rise of self-government to deal with important political questions affecting the Dominions save in close conjunction with these Dominions. Thus in 1857 Mr. Labouchere gave to Newfoundland, after her attainment of self-government, the assurance that her position would not be affected by treaties without her consent being obtained. In the great series of negotiations which took place at Washington in 1871 Canada was represented by Sir John Macdonald, who was one of the British delegates, and who was unable to agree with his colleagues on all points.[1] Not only was the promise as to France faithfully kept, but Canada was represented on the delegation which arranged the abortive Treaty of 1888 with the United States, and on the Joint High Commission which in 1898–9 made a determined but unsuccessful effort to settle the Alaska boundary and other difficulties outstanding between the two countries. After the crisis of 1907 was over, Newfoundland was induced to co-operate in arranging a *modus vivendi* for 1908, when the Order in Council passed in 1907 was revoked, and both that Dominion and Canada concurred in the wording of the terms of reference to arbitration of the fishery dispute in 1909.[2] In the case of the New Hebrides efforts to keep in touch with the Governments of Australia and New Zealand proved less successful,[3] and the two Govern-

[1] See J. Pope, *Sir John Macdonald*, ii. 104 sq. Contrast Sir C. Tupper, *Recollections of Sixty Years*, pp. 371, 391.

[2] *Parl. Pap.*, Cd. 4528 and 4815.

[3] *Parl. Pap.*, Cd. 2385, 3160, 3288, 3300, 3525, and 3876.

ments protested with much vigour against what they considered the inadequate consultation of them in this regard, though New Zealand consented to take a part in the drawing up of detailed regulations under the Convention of 1905. Curiously enough, in 1914, when a fresh conference on this question took place, though the Dominions were consulted, the grave mistake was made of having no representative of either on the body of British delegates, an omission which might have led to serious friction, but for the more important events which rendered the work of the Commission in endeavouring to introduce some order in the affairs of the New Hebrides unlikely to bear much immediate fruit.

In 1908 a further step in emphasizing the independent character of the Dominions was taken. In the arbitration treaty with the United States, concluded in that year, it was expressly provided that the Imperial Government reserved to itself the right, before accepting an agreement for reference to arbitration in the case of any matter affecting the interests of a self-governing Dominion, to obtain the concurrence of that Dominion in the agreement. The provision was intended to place the British Government in the same position in regard to such matters as the Government of the United States. Any treaty negotiated by the Government of the United States may fail to receive the approval of the Senate, and thus it falls to the ground, and under the arbitration treaty the approval of the *compromis* in each case was required from the Senate. It thus became possible for the Senate to refuse to a[illegible]t arbitration, and by the treaty the same right was [illegible]cured to any self-governing Dominion in a case in which that Government was concerned. The same principle was adopted in the Pecuniary Claims Treaty of 1910,[1] and again in the Treaty of 1914[2] regarding the establishment of a Peace Commission to consider questions in dispute between the two Governments, not only were the Dominion Governments co[illegible]ulted before the treaty was accepted, but it was provided that in the case of a dispute affecting a self-governing Dominion the member of the

[1] *Parl. Pap.*, Cd. 5803. [2] *Parl. Pap.*, Cd. 7963.

Commission chosen by the British Government could be changed so as to secure the presence of a representative of the Dominion on the Commission. But this principle has not yet been embodied in any other arbitration treaty, whether first concluded or renewed, since that date, as its acceptance was only secured because of the very exceptional position occupied by the Senate in the United States. On the other hand the doctrine of asking the consent of the Dominions before any arbitration treaty is concluded or renewed has been definitely and successfully adopted, as in the case of the renewal of the treaties with Spain and Italy in 1913, Switzerland in 1914, and the Netherlands in 1915. The gain in this mode of procedure is obvious, as if dispute arises it is not a question of the Imperial Government having to press the Dominion Government to accept arbitration for the sake of the Empire, but merely asking the Government to carry out an arrangement made by its duly authorized predecessor. Nor, so far, has it seemed necessary to obtain parliamentary sanction for such treaties.

At the Imperial Conference of 1911 the question for the first time was raised in concrete form as to the right of the Dominions to be consulted in the case of the negotiation of the great international conventions regarding war and peace, the Hague Conventions. The point arose in a rather curious way. The London Naval Conference[1] dealt with questions of the first interest to the Dominions, questions of contraband and capture at sea, and the results of the Conference, which were summed up in the Declaration of London, excited much interest in the United Kingdom, where they provoked a lively polemic and helped to focus the attention of the Dominions on the topic. The result was the formal motion on the part of the Commonwealth at the Imperial Conference[2] regretting the failure to consult the Dominions regarding the Declaration of London, and the frank admission of the Imperial Government that the omission to consult arose directly from the fact that the Dominions

[1] *Parl. Pap.*, Cd. 4554, 4555, and 5618.
[2] *Parl. Pap.*, Cd., 5745, pp. 79 sq.

were not represented at the Hague Conference of 1907, nor of course at that of 1899. Nor indeed had any suggestion of their representation at these Conferences previously been made by the Dominions. The Conference accordingly agreed that, when framing the instructions to be given to the British delegates at the next of such Conferences, the Dominions should be afforded an opportunity of consultation, and that when conventions affecting the Dominions had been provisionally assented to at the Conference they should be circulated to the Dominions for consideration before signature, and that a similar procedure, where time and circumstances permitted, should be adopted in the case of other international agreements affecting the Dominions.

It is impossible to avoid raising the question whether the position of the Dominions should not be definitely recognized by their separate representation by plenipotentiaries at the next Hague Conference or similar Conferences. The proposal is, of course, new, and it does go a good deal beyond anything contemplated at the Conference of 1911, when Sir Wilfrid Laurier[1] hinted reluctance to advise in these matters, since advice meant backing up that advice with assistance in war, and since Canada did not hold the view that she must necessarily send men and ships to engage in all British wars. The proposal then made did not go so far as even to suggest that Canada or other Dominion representatives should be included among the number of British representatives appointed as plenipotentiaries. But in that position it may be doubted if they would be a source of much strength: if they disagreed with the British delegates they would have to be overruled, and on the other hand their agreement with these delegates would hardly add much to the force of the British position, if they were merely regarded as classed with the British delegation.

There are undoubtedly difficulties in the way of any such proposal. In the first place it would be necessary for the Dominion Government to be invited, but it is certainly not an insuperable difficulty: it would always be possible for

[1] *Parl. Pap.*, Cd. 5745, p. 117.

the British Government to intimate that an invitation to the Dominions was expected, and, if not received, that the British Government would not find it possible to be present. Or, if desirable, before the next such Conference, this invitation of the Dominions could be secured by formal negotiations with the great powers. In the second place it is possible to object that such representation would be inimical to the unity of the Empire, and the position of the British Government. This view seems open to serious doubt: while on occasion differences of opinion might arise—if it is true[1] that the Dominions would have supported the exemption of property from capture at sea at the last Conference, it is proof that their absence from it was an excellent thing—but in the main it would be advantageous to the United Kingdom to have its views reinforced by those of representatives of populations of over fifteen million white people. At the last Hague Conference, of forty-four peoples represented, only thirteen had populations larger than Canada. It is, however, true that the spectacle of the separate representation of the Dominions might emphasize in a marked way the separate character of the elements of the Empire, but it is doubtful whether this would be more the case than at present, when the self-government of the Dominions has become notorious, and the unity of the Empire is already in some measure definitely broken up. But it must be remembered that in point of fact the full powers to act on these occasions would be issued by the Crown on the advice of the Imperial Ministry, and that the power of ratification again rests with the King on the advice of the Imperial Ministry, and thus in effect the presence of these delegates would attest the real unity in foreign matters of the Empire, in so far as it represents one sovereignty, and one controlling power for foreign affairs. It is also to be noted that not only in commercial matters such as merchant shipping, but also in the matter of radio-telegraphy, which has close relation to national defence, the precedent of the separate representation of the self-governing Dominions has already been set.

[1] J. S. Ewart, *Kingdom Papers*, ii. 239.

The more serious objection to be urged to the proposal is the fact that it would in such matters as those regulating the rules of war be a necessity that the result decided upon by the self-governing Dominions should harmonize with the views of the Imperial Government. It is perfectly clear that, if certain rules as to the conduct of war, whether naval or military, are laid down, it is impossible for a Dominion to refuse to allow the rules to be applicable in her case. If the Empire is at war any enemy would treat it as one, and could not be expected to discriminate between different parts, just as it would in fact be impossible for the different forces of the Crown to carry on the war according to different rules. The most simple case that can be thought out is that of the question of the capture of merchant ships at sea. It might be agreed by the majority of the powers and by one of the Dominions that this power should not be exercised, while other powers, including the United Kingdom, retained the power. Now the Dominion war vessels, if any, might in theory not be used to capture such merchant vessels, and in return the Dominion might expect that the foreign power would not capture her registered merchant ships. Obviously, however, the other power would at once be able to object that the British disposition of forces would place the Dominion vessel, with its inability to capture enemy merchant vessels, in some part of the field of operations where it would have other work to do, and would send a British vessel instead to the point where merchant vessels could be expected to be captured, and would not for a moment agree to spare Dominion ships because they were registered in such a Dominion. In any other case which can be imagined the absurdity would become more palpable. If military or naval forces act together they must act under one code of international law, or confusion will be endless. The strength of this reasoning can be illustrated by an obvious case: on the occasion of the European War it was found essential for France and the United Kingdom to assimilate as closely as possible their laws as to naval prize, and that despite the fact that the two fleets were in every way distinct and not so

closely allied in action as any Dominion and British fleets must be.

This consideration, however, is not an argument which is conclusive against the concession of separate plenipotentiaries: in these Hague Conferences, it is notorious that allied powers go with the intention of supporting the views which they have agreed upon before the meeting, and the same arrangement could easily be made among the representatives of the several Britannic Governments. It is only necessary that the final action to be taken should be agreed upon, so that if the delegates in the first instance cannot agree, it is open for the final decision of the different Governments to be arrived at after the discussion at the Conference, and after it is known how the majority of powers have decided to act. This is rendered easy by the fact that signature of the Hague Conventions can be delayed for a certain time, which can be varied by agreement, and that if there arose a difference of view among the delegates the matter could be finally arranged by discussion with the governments concerned. The position would for all practical purposes be just as difficult if the Dominions were only allowed to send members to serve on the British delegation. Such delegates would certainly not consent to serve if they were simply to agree with the British delegates: as early as 1883, at a conference regarding the protection of submarine cables, Sir C. Tupper voted differently from the other British delegates, and won them round to his view,[1] and in the negotiations at Washington in 1871, Sir John Macdonald engaged in a vehement controversy with the British delegates. Nothing would thus be gained by the refusal to create the delegates plenipotentiaries, and there would be lost the weight given by the effective appearance of the representatives of coming nations, two of which are already sufficiently large in population to count as important powers even in an international sense, while they have before them prospects which promise the one a commanding position in the future comparable to that of any power in the world, and the other a place of

[1] *Recollections of Sixty Years*, p. 175.

honour and dignity among the nations. It is doubtful if the sense of authority of such communities can ever be adequately satisfied by mere inclusion in any British delegation, however much they might be able to influence that delegation.

It must be borne in mind that the making of conventions tends more and more to require legislation in the Dominions, and the time when the Dominions could be expected to pass legislation in this regard without knowledge is past. It is also equally out of the question to expect the Dominion Parliaments longer to acquiesce in the passing of Imperial legislation on these topics without consultation, and in most cases the passing of local legislation will be doubtless preferred. The *Geneva Convention Act*, 1911,[1] indeed was passed without any such reference to the Dominions, but provision was made in it for adaptation by Order in Council to the Dominions, and it was accordingly adapted in consultation with the Dominion Governments, but even so the passing of such a measure which actually interfered with Dominion trade-marks was obviously unconstitutional.

There is every ground to prefer the extension of the authority of the Dominion Governments under the form of the appointment of plenipotentiaries by the King, and his ratification of their actions with, in each case, the advice of the Imperial Government. The latter qualification is of course essential: if the advice on which the representatives of the Dominion were appointed plenipotentiaries and their acts ratified was that of Dominion ministers alone, then the Crown would cease to be an element of unity, but would become a different personality for each part of the Empire, and nothing could result but inconvenience from a position which converted the King resident in the United Kingdom into an independent and different sovereign, living indeed in the United Kingdom, but acting in a totally different capacity. The exercise of the power of appointment and ratification ultimately on the advice of the Imperial Ministry, though

[1] It was passed to permit of the withdrawal of the reservation made by the United Kingdom to the Geneva Convention of 1906; *Parl. Pap.*, Cd. 7715.

that Ministry would normally act as desired by the Dominion Governments, retains in the Crown a centre of unity in the Empire, and some unity is essential to the existence of the Empire. Moreover, the observance of these forms would avoid the disadvantages which now arise from attempts at separate treaty-making, such as that of the Canadian ministers in 1911, whose action, had it been ratified by the Parliament of Canada, would have undoubtedly tended to diminish the unity of the Empire, and perhaps ultimately to destroy that unity altogether.

It is a matter of some importance that the demand for the right to make treaties independently of the Imperial power, though it has been claimed now and then, as for instance, in the proposal for the neutrality of the Colonies made in 1870 by certain members of the Royal Commission appointed by the Governor of Victoria to consider questions of federal union, and though it has on several occasions been the subject of discussion in the Parliament of Canada,[1] has never led to the definite adoption by a responsible Parliament of the Empire of the demand as justifiable and desirable. It is, however, clear that the policy of the Liberal Government in Canada in the years 1910 and 1911 in negotiating so freely with the Consuls-General of the foreign powers resident in Canada was one of some danger to the unity of the treaty power, and the sense of the changing position thus accorded to consular officers was shown by the debate which took place in the Canadian House of Commons at the end of 1910,[2] when the proposal was made that the consular officers of the great powers should be given a quasi-diplomatic rank and recognition, a proposal which Sir Wilfrid Laurier neither accepted nor refused outright, confining himself to a statement of the development in the position of these officials which had taken place. It must, however, be regarded as doubtful in the extreme whether the

[1] See *House of Commons Debates*, Oct. 3, 1874; April 21, 1882; Feb. 18, 1889; April 7, 1892; Feb. 20, 1908; Willison, *Sir Wilfrid Laurier*, i. 206 seq.

[2] Cf. *Canadian Annual Review*, 1910, p. 89.

development of the diplomatic position of consular officers is in any way to be desired. It is indeed argued in favour of this course that it is thus possible to ascertain more accurately the views of the foreign powers than can be done through the diplomatic channel, but the strength of this view certainly seems to be very slight, and to be contradicted by probability and by facts. Quite as much as any diplomatic officers, consuls have to refer back to their Governments at every point for instructions, and detailed arrangements of any kind are not matters in which they seem to be competent to give any great deal of assistance. At any rate, when the first adherence of Canada to the Japanese treaty of commerce was given in 1906 the Canadian Government seem to have acted on the views of the Japanese consular officer in Canada to the effect that there need be no fear of any considerable Japanese immigration, and, when his predictions were falsified by the considerable influx of Japanese from Hawaii which culminated in rioting in British Columbia, it is significant that it was to Japan that Mr. Lemieux was sent with instructions to negotiate with the assistance of the British Ambassador an arrangement for the purpose of avoiding any recurrence of the difficulty, and it was in Japan that the satisfactory arrangement was arrived at. The two conventions with France of 1907 and 1909 were both negotiated direct with French ministers by Mr. Fielding, and it was at Washington with the President and his Secretary of State that the Canadian ministers in 1911 negotiated. Even assuming that consular officers of specially high qualifications were sent to the Dominions, it would always seem better for the Dominion Governments to get into direct touch with responsible ministers in the foreign countries concerned, and only thus of course, when they act formally and under the control in the long run of the Imperial Government, can they have any security that they are not inadvertently injuring other Imperial interests. Nor of course can the fact be overlooked that the Imperial interest is often of the greatest assistance to the Dominions in negotiating treaties. It is not to be supposed for a moment that the same terms

would, for instance, be given to Newfoundland [1] as are given to the United Kingdom without the intervention of the latter, and for most of the Dominions the Imperial Government has already been able to win considerable commercial advantages by associating them with herself in trade negotiations. In fact it may fairly be said that a separate negotiation is really one which is conceived from a purely selfish point of view, and that if any Dominion is anxious not to neglect Imperial interests at large she will normally and naturally seek the support of the Imperial Government, which must have a special knowledge of the interests of the other parts of the Empire.

There is a matter of recent date which points to the realization by the Dominions of the advantages which are to be derived from close co-operation with the Imperial Government. The practice of appointing trade agents to perform in the foreign countries to which they are sent trade functions for the benefit of Dominion subjects has been carried to a considerable extent by the Dominion of Canada, and to a much less extent in Australia. It is now clear that these appointments have seldom much success in the purposes for which they are intended. The propensity of Canadian trade agents for getting into trouble with the Governments of the countries where they are posted by injudicious action in tempting people to emigrate from countries whence emigration is forbidden is notorious, and was the cause of a very grave dispute in 1914 with the Government of Austria-Hungary, which, though due in the main to intrigues on the part of the German rivals of the Canadian railways, was in part, no doubt, caused by connivance at prohibited emigration. In this case the persons involved were not Government employees, but it was currently reported on excellent authority that so distinguished a man as the late High Commissioner for the Dominion was unable to visit Germany in view of proceedings which the German authorities were anxious to take against him in respect of contraventions of German law.

[1] e.g. the concessions on Newfoundland fish secured in the Portuguese treaty of commerce.

Further, the Conservative Government when taking office in 1911 found that the conduct of the work of the agencies in Europe was in considerable measure unsatisfactory, and it decided to make more free use of the facilities offered by the Foreign Office for the employment of British consular and diplomatic officers in connexion with the advance of Canadian trade. The wisdom of the decision in question is obvious: it would be hopelessly expensive for any Dominion to duplicate the system of consuls, and even if the men were appointed they could not receive any consular status, as the right to appoint consular officers is one which appertains only, and is accorded in treaties solely, to the sovereign power in the Empire. If it were desired to give them consular status, this could indeed be done by securing their appointment by the Crown as His Majesty's consuls for Canada, or whatever other Dominion was concerned, but such an appointment would mean that the holders of office were appointed on the advice of the Imperial Government, and would have to be subjected to the control of the Imperial Government, since that Government would be responsible for them *vis-à-vis* the foreign Government, as it is not now responsible for mere commercial agents. The same result can be attained more effectively and easily and much more cheaply by the use of British consuls by the Dominions, who can pay if necessary any extra clerical expense caused by their employment. The same consideration, it may be added, applies to the representation of the Dominions by diplomatic officers in the foreign capitals: these officers could not, as long as the Empire is constituted as at present, be other than appointees of the Crown on the authority of the Imperial Government.[1]

One class of treaties presents a special interest, that regarding extradition, by reason of the curious fact that up to the latest date these treaties have been regarded as something on which the Dominions do not need to be consulted,

[1] The statement in the *Canadian Annual Review*, 1910, p. 90, that in the case of Mr. Preston's appointment as Trade Commissioner in Holland he was given a British status without British control is a mistake. This was not done in any way.

and which therefore become applicable to the Dominions without reference to their wishes. There is, of course, no logical reasoning for this procedure, which will doubtless follow the example of similar illogical procedures and disappear for good. The principle that a criminal should be extradited, to whichever part of the world he may fly for refuge, is doubtless sound, and the British Dominions are hardly likely in any case in which they are consulted to seek to refuse the surrender of a criminal by remaining outside the scope of an extradition treaty, but that is clearly no reason why they should not be allowed the option of deciding for themselves, and similarly it should be possible for any Dominion to be withdrawn from the operation of such a treaty by due notice if it so wishes. In such a case, there would of course be perfect mutuality of rendition: if the Dominion were not affected by the treaty her criminals could enjoy safety in the country affected by the refusal, and *vice versa*. Moreover, it may be desirable that the views of the Dominions should be consulted as to the exact nature of the crimes to be inserted in the schedule to the treaty in which the offences covered by it are enumerated.

A further deduction from logical principles leads to the view that the Imperial Government must not hesitate when desired to conclude special conventions for the extradition of fugitive offenders for the benefit of special Dominions, which may have special conditions not within the existing treaties. It is probable enough that this could not effectively be done under the terms of the existing *Extradition Act*, which does not appear to contemplate any such procedure, but to recognize only a general extradition treaty. But it is obvious that should two countries, one a Dominion and one a foreign country, have conterminous boundaries, the effect to a treaty could always be given by the simple process of reciprocal legislation without recourse to the terms of the Extradition Act at all. More difficulty would arise if the person to be extradited were being conveyed through British territory outside the Dominion affected, since in such territory he would appear clearly not to be in any legal custody what-

ever, and to legalize his detention either an extension of the Imperial Act or local legislation would be required. It is, however, obviously doubtful whether such a case could easily arise, since the conclusion of special treaties would almost always be required because of the necessity of meeting some crime specially common in two adjoining countries with common interests.

Special interest attaches to the Canadian legislation on extradition, because alone of Dominion Legislatures that of Canada has insisted on so legislating to cover the whole ground as to allow of the suspension by Order in Council of the Imperial Act in respect of the Dominion of Canada. This suspension has, however, one real disadvantage: a fugitive offender when being conveyed through the United Kingdom *en route* to a foreign state on extradition cannot, it seems, be said to be in legal custody in the United Kingdom under a warrant of the Dominion. Of course, however, in so far as the crime for which he is being extradited is one which would render him liable to extradition under the treaty from the United Kingdom, he could be rearrested, if he attempted to secure his freedom by writ of *habeas corpus*, under a British warrant. There is, however, the possibility, decidedly remote and theoretic, that a crime might be one for which a man could under the Canada Act be extradited from Canada, and yet not under English law be technically an extraditable offence, as the list of offences in the two Acts does not quite perfectly correspond, but this is a case of quite minimal possibility.

Canada is also of interest for her attempt to adopt in 1889 a system of extradition without treaty,[1] a system which was recommended for England by a Commission in 1878, but which has never actually been made effective in that country. In Canada also the part of the Extradition Act affected has remained a dead letter, though it is legally ready to be put

[1] It was actually in force in Upper Canada before the first extradition treaty of 1842 by 3 Will. IV, c. 6. See now *Revised Statutes*, 1906, c. 155, Part II. Its need was diminished by the passing of the new treaty of 1889 with the United States into force in 1890.

in force if and when the Dominion Government deem it desirable to take this course. The procedure would be easily available for cases of crime in the United States: the Dominion Government in this regard showed an admirable promptitude of action in the famous case of the entry of the criminal Harry Thaw into Canada on his escape from the asylum in which he was then confined. The Minister of Justice took the control of the question into his own hands, and promptly under the powers of the Immigration Act deported Thaw, and left him in the hands of the police on the other side of the border, his personal action confounding the efforts of Thaw's legal advisers to secure legal process preventing his removal from the Dominion. The effectiveness of the Minister's conduct [1] in preventing the scandal of protracted legal proceedings was admiringly noted in the United States press. Nor could there be any doubt of the correctness of the action of the Minister, as no alien has any statutory right [2] to enter the Dominion, and the question of whether he was guilty of an extradition crime, in view of his having been found insane at the time of the murder he committed, would have afforded abundant theme for dispute before the courts.

[1] Cf. Canada *House of Commons Debates*, March 4, 1914; New York *Tribune*, Sept. 11, 1913; *Canadian Annual Review*, 1913, pp. 239–41.

[2] *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272.

CHAPTER XV

THE QUESTION OF DEFENCE

1. Military Defence

That a self-governing Dominion should protect itself from internal disorder, and that it should, as circumstances allowed, make some provision for its own defence, was a truth which was rather slow to receive quite definite formulation after the grant of responsible government. The view was, however, at last attained in 1862, when this doctrine was laid down by a resolution of the House of Commons. Its execution was, however, far from hurried, and passed through the stage when the colonies might have Imperial troops if they chose to pay for them to the period when the Imperial troops were strictly confined to the necessities of Imperial as opposed to local defence. It was never for a moment doubted that if any part of the British Dominions was attacked the whole force of the Empire must be used to protect it: that principle was reiterated time after time, and not a single utterance to the contrary can be traced, but it was felt that except for the needs of Imperial defence (including in this term the defence of the colony against external attack) Imperial forces could not properly be used. The conception of what was necessary for Imperial defence naturally differed from time to time. In Australasia the experience of the use of Imperial troops in putting down Maori wars was unfavourable: a New Zealand Government actually endeavoured to lay down the rule that the troops must be employed as they thought fit, and that the policy to be adopted towards the natives must be precisely as they wished, a proposal which would of course have reduced the Imperial Government to the level of a tributary of New Zealand. The view was indignantly repudiated by the Imperial Government of the day, a precedent

which might have been borne in mind in the case of the similar demand of Natal in 1906,[1] and the result was the withdrawal of the Imperial forces, in the confidence that on the one hand the power of the natives had been so broken that there was no danger of the colonists being unable to hold them in subjection, while on the other hand the need of carrying on their own wars of repression at the cost of their own lives would impress on the colonists the desirability of substituting, for a policy of blood and fire, a milder and better considered régime. The result was, as expected, to the great benefit of the colony and all its inhabitants. In Australia there was still less need to keep Imperial troops, and the unwillingness of the colonies to agree to a plan for concentrating the troops, in case of need, led to their withdrawal also. In Canada, on the other hand, the Imperial Government recognized other obligations, and spent money freely on the defences of Quebec, even after confederation, while it guaranteed a Canadian loan to improve the militia, and provide fortifications for Montreal. In later times the Imperial forces were still available for defence: in 1870, when the Riel rebellion seemed for a time to threaten the intervention of the United States, and the dismemberment of the west of Canada, it was an Imperial force which after a most difficult journey arrived on the scene and ended the revolt at once. In 1885, on the contrary, when the north-west rebellion broke out, the building of the Canadian Pacific railway had made things easy, and the Canadian forces performed without difficulty the work of suppression themselves. The Imperial forces, however, continued down to the period of the Boer War to man Halifax and Esquimalt, on the ground that these were important naval bases, and therefore of Imperial consequence. But as a result of the pressure for troops in that war, the Canadian Government decided to offer to relieve the British Government of the need for retaining a garrison there, and after the conclusion of the war arrangements were made for the final handing over to Dominion control of the two places, and the naval docks there on conditions which

[1] Above, Part I, chap. iv.

secured their retention as naval bases open to the use of the British fleet whenever required.[1] With the departure of the British forces finally from Canada, the former practice by which the officer commanding the Canadian militia was always an Imperial officer ceased to have effect, and the post became open to officers whose military experience was Canadian, one of whom, General Otter, held the post with great distinction. In South Africa, on the other hand, the final removal of the Imperial forces was only carried out at the beginning of the European War, and the outbreak of the grave rebellion in the Union, as a result in part of this removal, proved that the retention of troops had not been by any means unduly prolonged.[2]

During the long period after the practical withdrawal of the Imperial forces from Canada and Australia, attempts were steadily made by the Imperial Government to induce the Dominions concerned to take seriously the necessity of maintaining their forces in good condition, and Imperial officers worked energetically in positions as commandants of these forces to secure good results. The task was, however, practically impossible of realization. The officers themselves were apt to misunderstand the limits of their authority and power: the Canadian Government, indeed, found it almost impossible to avoid quarrelling with its Imperial officers: it dismissed one, and the others were always at variance with the extraordinary methods by which officers were appointed on political grounds alone. Moreover, in all the Dominions it was hard to obtain funds for any serious military work, and there prevailed the feeling that the British navy was the true basis of defence and that local forces should just be sufficient to keep down riots or disorder of an internal nature. It was not until the twentieth century that anything effective was done. The formation of the Australian Commonwealth had been expected to mean a serious effort to reconstitute the scattered forces of the states, but for years the expectation was disappointed, and in 1908 the military efficiency of the Commonwealth was certainly not superior to what it had

[1] *Parl. Pap.*, Cd. 2565. [2] Cf. *Parl. Pap.*, Cd. 7874.

been in 1900, and indeed, may have been inferior. The transcontinental railway to connect Western Australia with the east of the country was still unbegun, and Australia could not claim, as Canada claimed, both through its Liberal and Conservative Governments, that with its limited resources it was doing far more useful work for defence by its railway policy than by training a few thousand more recruits annually for a few weeks.[1] Indeed, the obvious necessity for military purposes of a single railway gauge had never been recognized, and the gauge adopted by the several states was a different one.

The distinct menace of European complications which arose in 1909 had a considerable effect in fixing the views of the Governments on defence questions. Canada indeed remained practically unmoved, but in New Zealand[2] and Australia[3] the view definitely presented itself that there should be some system by which men should be trained for the defence of the country, and in that year both countries adopted defence systems of training which compelled the youth of the country to undergo such training. But the schemes were dominated by the fear of political consequences, and both stopped compulsion at the age when the youth became a voter, an interesting example of the timidity of even the Dominions in dealing with the duty of defence of the country. These schemes, however, were revived when Lord Kitchener visited both the Commonwealth and the Dominion at the end of 1909 and beginning of 1910: he made a careful survey in each case of the existing conditions, and insisted that if there were to be possible any adequate defence scheme the training must not stop at the exact period when a youth became valuable from a military point of view. The result was that both Dominions[4] amended their laws in 1910, and have since then, despite modifications in detail, adhered fixedly to the general plan then laid down.

[1] Sir C. Tupper, *Recollections of Sixty Years*, p. 283.

[2] Act No. 28 of 1909. [3] Act No. 15 of 1909.

[4] Acts No. 21 of 1910 and 37 of 1910. See *Parl. Pap.*, Cd. 5582, pp. 16, 17.

As a result of this report, New Zealand established a system under which all male inhabitants of the Dominion after six months' residence became liable for military training, provided they were British subjects: the periods were from twelve years of age to fourteen years of age or the date of leaving an elementary school in the junior cadets, from that age to eighteen years or the date of leaving a secondary school in the senior cadets, and from that age to twenty-five either in the general training section or in the territorial force, the distinction being due to the fact that it was considered impracticable to insist on all those eligible going through the full training, as it would cost too much money, and therefore the general training section was to be limited to about 30,000 a year. The scheme, however, was modified later[1] in three important respects: in the first place, after further consideration, the military training of the junior cadets was abandoned as useless, and a training under the education department on the methods of the boy scout movement substituted. In the second place it was found practicable so to arrange the times of drill and training that an average youth by the age of twenty-two would be free from further training, though of course under liability to serve in case of need, and in the third place exemption was accorded to persons whose religious beliefs prevented them consenting to military training, on the condition that these persons should be called upon to perform such work for the public service, other than military, as might be determined by the Governor in Council. For the conscientious objector no place could, however, be found, unless he could show that his conscience rested on religious convictions.

The trainee from twenty-five to thirty years of age serves in the reserve, and in time of war not only can these forces be called out, but all male inhabitants of New Zealand between the ages of seventeen and fifty-five may be called upon to serve if they have resided six months in the country.

In the Commonwealth the scheme has been less modified[1]

[1] Act No. 20 of 1912; *Parl. Pap.*, Cd. 6863, pp. 15, 16, 134–43; 7507, pp. 12, 13.

than in New Zealand. All male inhabitants who have resided for six months and are British subjects are liable for training from age twelve to age fourteen in the junior cadets, from age fourteen to age eighteen in the senior cadets, from age eighteen to age twenty-five in the citizen forces, and from age twenty-five to age thirty-six in those forces; but, except in time of imminent danger of war during the last period, the service shall be limited to one registration or one muster parade in each year. All male inhabitants between the ages of fifteen and sixty years, after six months' residence, if British subjects, are also liable for service in case of war. It has not been found possible to make any exception in the case of liability to military service even for religious objectors, and the work of enforcing the military training on the cadets has necessitated some additions to the criminal law, in the shape of the invention of a process of military detention for boys who will not obey the regulations. The periods of service at first exacted have been considerably lowered, but the value of such training as is given has been asserted on all hands.[1]

The example of Australia and New Zealand was followed, but with innovations of an interesting character, by the Union Government on its establishment. Under the *Defence Act*, 1912,[2] every citizen is liable between his seventeenth and sixtieth year to render in time of war personal service in defence of the Union, and he is also liable to undergo a course of peace training for military service, and may be required to commence that training in his twenty-first year, and to complete it not later than his twenty-fifth year, but he may voluntarily commence it in any year between his seventeenth and twenty-first year, in which case, of course, he may even finish his training before his twenty-first year is completed. Of the total number liable to peace training only fifty per cent. shall actually undergo the training unless special provision is made otherwise by Parliament. But every citizen who has not been entered in his twenty-first year and is liable

[1] Acts Nos. 15 of 1911; 5 of 1912; *Parl. Pap.*, Cd. 6863, pp. 126, 127; 7507, pp. 11, 12.

[2] *Parl. Pap.*, Cd. 6863, pp. 144–63; cf. 6091, pp. 88–106.

to training must serve as a member of a rifle association from his twenty-first year for a period of four years. The privilege of such service and the duty of so serving is, however, not accorded to other than Europeans, a distinction resting on the fundamental conditions in the Union.

In the case of Canada no change has been made for many years in the conditions of service in the militia. All Canadian inhabitants of British nationality are liable for such service in the period between age 18 and age 60, and the Governor-General may require all the male inhabitants of Canada capable of bearing arms to serve in the case of a *levée en masse*. But the militia is recruited in effect by voluntary enlistment, though the power to use the ballot exists, and every proposal to make the condition of service in the militia compulsory would be resisted to the utmost by the province of Quebec, as well as by many other elements in the Dominion. The training of the militia, about 40,000 of whom serve annually, is in many respects defective, the equipment is deficient, and political influence has done its best to deprive the force of efficiency; but the raw material of the militia has always been as excellent as the spirit of patriotism in the forces. Moreover, the efforts of Sir Sam Hughes, the Minister of Militia in the Borden administration, have undoubtedly borne much fruit.[1]

The constitutional relations between the forces of the Crown in the Dominions and those in the United Kingdom are happily in the case of the Army of a very simple kind. It was long ago recognized that in militia armies the exact code of discipline of the regular British forces was out of place, and a distinction has been drawn by Dominion legislation between the small permanent forces retained for instructional purposes, or in South Africa in the main as a police force of military character, and the mass of the forces. But the discipline thus applied is based on the Imperial *Army Act*, and it follows it closely in most of its principles. When the forces of the Dominion are employed outside the Dominion in

[1] *Revised Statutes*, 1906, c. 41. A most important report of Gen. Otter's is summarized in *Parl. Pap.*, Cd. 7507, pp. 10, 11.

operations it is provided by s. 177 of the *Army Act* that, where any force of volunteers or of militia or any other force is raised in a colony, any law of the colony may extend to the officers, non-commissioned officers, and men of such a force whether within or without the limits of the colony, and any such law may apply, in relation to such force, and to any officers, non-commissioned officers, and men thereof all or any of the provisions of the *Army Act*, subject to such adaptations, modifications, and exceptions as may be specified in such law, and where so applied the *Army Act* shall have effect in relation to such force, subject to such adaptations, modifications, and exceptions as aforesaid, and where any such force is serving with part of his Majesty's regular forces, then, so far as the law of the colony has not provided for the government and discipline of such force, the *Army Act*, and any other Act for the time being amending it, shall, subject to such exceptions and modifications as may be specified in the general orders of the general officer commanding his Majesty's forces with which such force is serving, apply to the officers, non-commissioned officers, and men of such force, in like manner as they apply to the officers, non-commissioned officers, and men of the regular forces. This, however, is not applicable in the case of any officer belonging to any colonial force when he is attached to or doing duty with, or to any non-commissioned officer or man belonging to any such force when attached to, or otherwise acting as part of or with, any portion of the regular, reserve, or auxiliary forces in the United Kingdom. The last provision is of value, since otherwise it would appear that when an officer or man was attached to an Imperial unit he would be governed by the colonial law, which might result in complete confusion, since the unit itself could not be subjected to that law.

In the case of officers lent and men placed at the disposal of Dominion Governments by the Imperial Government the *Army Act* remains applicable to them, but they fall also under the law of the Dominion and its military regulations, thus being subject to joint jurisdiction, which, however, is a disadvantage of little special importance. Moreover,

legal provision has been made for and by the Dominions to cover the case of recruits for the Imperial forces raised in the Dominions, and to secure their discipline and control before joining these forces, and on the way back to the Dominions from such service, while of course it is still open to recruit men directly for the Imperial forces in any Dominion, in which case the *Army Act* is directly applicable, as in the case of Canada at the beginning of the war.

While the arrangements made by law to facilitate and legalize the co-operation of the Imperial and the local forces is now satisfactory, it must be recognized that the obligation of such service imposed on the inhabitants of the Dominion is service for domestic purposes, and not service for oversea purposes, though men may volunteer for that purpose. It follows, therefore, that not only has the Imperial Government no power to move a single Dominion soldier, but that the local Government has no power without fresh legislation to compel service oversea. The principle of the autonomy of the Dominion is thus preserved in full perfection: any men who serve overseas serve by the free will of themselves, and if organized by the free will of their Government. It is true that no Government has the power by law to prevent recruiting for the British Imperial forces in the Dominion, but to assume such a power would obviously be incompatible with the constitution of the Empire, as it would mean that a portion of the Empire could forbid a subject of the Crown from fighting voluntarily in its cause, and such a claim could not exist in the present circumstances. If the Government and Parliament desire to assist actively in the war the Government encourages recruiting, and spends money on the equipment and pay of the forces, which it obtains from Parliament.

The necessary similarity of training which should exist between the forces of the Empire is attained in such measure as is available by the means of inspection, interchange, and instruction of Dominion officers in schools of instruction in the United Kingdom or in India and the creation of a general staff.[1] The inspection of the forces of the oversea Dominions

[1] *Parl. Pap.*, Cd. 4475 and 5746, 15.

is and must be exercised on the request of these Dominions, and the last important visits of inspection were those of the Inspector-General, Sir Ian Hamilton, in 1913–14, to Canada, to Australia, and to New Zealand. The value of these inspections by trained Imperial officers with practical experience of war is greatly valued in the Dominions. The interchange of officers is also sometimes possible with excellent results for the Dominion officers on the one hand and with some profit to the Imperial officers on the other, especially if the latter have Dominion connexions of any kind. But the most frequent mode of allowing Dominion officers to attain knowledge must be the use of schools of instruction, and attendance at the Staff Colleges at Camberley and Quetta, since it would be difficult for any Dominion Government to afford the same educational advantages to a student of war. The appointment of trained British officers to the chief commands in the oversea forces is almost always advantageous to those forces, and in the future the existence of large numbers of Dominion trained officers will supply adequately all needs, and will probably render exchanges more frequent and effective than they have hitherto been. The Dominions also are learning to make the necessary supplies of munitions of war of all kinds, including artillery, and in this, of course, they follow the teachings as a rule of the Imperial War Office: the chief exception to this rule in Australia, a cartridge factory entrusted to American hands, has not been an unqualified success.

2. Naval Defence

The essential characteristic of naval action as operating extra-territorially has resulted in the raising of grave questions of constitutional law for which no parallel has evinced itself in the case of military defence. These questions have, however, become of importance only of very recent years, since the development of naval activity on the part of the Dominions dates back in effect only to 1909. But the first difficulties arose as early as 1860, when the Parliament of Victoria, in view of the fact that they had under their control

an armed vessel, the *Victoria*, which was employed as a transport to convey troops to New Zealand to suppress the Maori rebellion there, found it necessary to establish the legal position of the crew by legislating for the government of the ship, its officers, and men. The passing of the Act, which the Governor assented to on the ground of urgency, led to a full consideration of the matter, and to the decision that it was impossible for a colonial legislature to pass an Act which would have extra-territorial validity, and that a vessel thus acting under a mere colonial authority would therefore not be a vessel of the Crown in the view of international law, since her authority to do warlike acts, even in case of war, would be limited to the territorial limits of the colony. To remedy this defect, there was passed in 1865 an Act, the *Colonial Naval Defence Act*, which governed the position in Australia for many years. It authorized any colonial legislature, with the approval of the Crown in Council, to maintain ships of war, and naval forces, including volunteers, who were to be bound to serve in the Royal Navy as required, to regulate the conduct of such forces while ashore or afloat in the limits of the colony, and to apply to the forces when ashore or afloat within the colonial limits, or elsewhere, the regulations in force regarding the Royal Navy. It also authorized the acceptance by the Admiralty of offers of colonial governments of vessels and men, in which case the vessels and men would fall under the rules in force for the Navy. It will be seen that the intention of the Act was to leave the colonial legislature, if it desired, to make any regulations which it wished for the government of the men within the limits of the colony, but if they went without they would fall under the regulations for the Royal Navy, and the same result would be attained, but in a different way, if the men and ships were transferred to the control of the Admiralty: in the former case the control of the ships would remain with the colonial government, in the latter with the Admiralty, but, of course, the control of the Admiralty would in effect have been exercised even in the first case had the vessel been acting where there was a senior officer of the Navy present,

The provisions of the statute were made effective in Victoria in 1872 by the passing of Colonial Acts Nos. 389 and 417, and in 1884 further Orders in Council were issued under the Act in respect of the *Victoria*, *Albert*, and *Childers*, vessels of war which had been built in England for the Government of Victoria, the vessels being placed under the Admiralty for the time of their voyage to their destination, when they fell under the control of the Victorian Government. In 1900 Orders in Council were again issued to accept the services of men offered by New South Wales and Victoria, and a vessel, the *Protector*, offered by South Australia to the Admiralty for service in China, and in 1884 an Order in Council was issued in accordance with a South Australian Act of that year to authorize the maintenance of the *Protector*, while in 1885 two Orders in Council were issued in accordance with the Queensland Act, No. 27 of 1884, to provide for the maintenance of the *Gayundah*, and its being placed for the time at the disposal of the Admiralty.

It would, however, be erroneous to suppose that the whole of the armed ships—of very miscellaneous character and not much value—which the Commonwealth found owned by the States when it came into existence were raised under the powers of the Act of 1865. In the majority of cases the vessels were raised simply under the general power of the colonial legislatures to regulate their own affairs within territorial limits, and therefore their right to maintain a naval defence force in these limits. It is beyond all doubt that internationally within these limits the ships were as much ships of the Crown as the Royal Navy itself, and the officers had internationally all the powers of the officers of the Royal Navy in the matter of the resistance of hostile attack and the capture of prize, though luckily no need for the exercise of these powers could well arise.

The *Commonwealth of Australia Constitution Act*, 1900, raised a new question. It conferred on the Commonwealth power to legislate as to naval defence, and that mere fact was a clear hint that the purely territorial limitation of

colonial laws did not apply to this specific power. It was obvious that the power to legislate must extend at least to cover the case of any naval force operating to such extent as was necessary to drive away enemy ships from the coast of the Commonwealth, and this meant extra-territorial action in many cases. This conclusion was greatly aided by the fact that s. 5 of the Act expressly provided that the laws of the Commonwealth should be in force on all British ships, the King's ships of war excepted, whose first port of clearance and whose port of destination should be in the Commonwealth. The very nature of a defence force of the Commonwealth meant that it would move from one point of Australia to another, and therefore that it would always fall within that clause, unless, indeed, it was contended that it was exempt from Commonwealth control altogether by reason of being one of the King's ships of war. Such an interpretation would obviously have been unreasonable, for it would have rendered invalid the whole of the naval defence legislation of the Commonwealth and made its power to legislate for naval defence unmeaning. In point of fact, by an Act, No. 20 of 1903, the naval defence of the Commonwealth was fully regulated, and thereupon the state Acts fell to the ground, and with them the Orders in Council based on them. Doubtless it was still open for the Commonwealth to obtain Orders under the Act of 1865, but that Act was not in any way a necessary mode of procedure, and it was not surprising that the Commonwealth Parliament, in its naval legislation, No. 30 of 1910, relied solely on its own power of legislation, and the same course was followed in that year in Act, c. 43, by the Parliament of Canada. In the case of Canada the legal validity of the power was hardly so clear as in that of the Commonwealth, as the Canadian constitution contains no clause similar to that of s. 5 of the *Commonwealth Constitution Act*, but there could be no legitimate doubt as to the right of the Dominion Legislature thus to establish its own naval defence. Doubt was only possible as to what extent the right could be carried, and how far from the shores of a Dominion the defence could be exercised, without exceeding the lawful

powers of the Parliament and the authority vested in it.[1] Clearly, so far as these powers were lawfully exercised, any Dominion ship was an Imperial man of war, but when they were exceeded she ceased to have that character.

The solution of this legal difficulty was necessary, and it was provided by an adaptation of the procedure laid down in s. 177 of the *Army Act*. By the *Naval Discipline* (*Dominion Naval Forces*) *Act*, 1911, it was provided that where in any self-governing Dominion provision has been made for the application to the naval forces raised by the Dominion of the *Naval Discipline Act*, 1866, as amended by any subsequent enactment, that Act as so amended should have effect as if references therein to his Majesty's Navy and His Majesty's ships included the forces and ships raised and provided by the Dominion, subject in the application of the Act to these forces and ships to such modifications and adaptations as might be made by the law of the Dominion to adapt the Act to the circumstances of the Dominion, and in its application to forces and ships not provided by the Dominion to any modifications and adaptations made by His Majesty in Council in order to regulate the relations *inter se* of the different forces and ships. But if the forces and ships of Dominions were placed at the disposal of the Admiralty, the Acts should apply to them without any modification at all. The Act was not to take effect in any Dominion unless provision was so made by the Dominion, and such provision was duly made by New Zealand in its Act of 1913, and by the Commonwealth in 1912 by Act No. 21, but in a form in both cases which is of doubtful validity, as it makes the application of the Act subject to the power of the Governor-General or Governor in Council to modify it, which is clearly not possible, as it is not provided for by the Imperial Act. The Dominion of Canada, however, has not legislated on the subject.

[1] The views of J. S. Ewart, *Kingdom Papers*, i. 203, 204, are vitiated by his fundamental error in stating that Canadian law follows a Canadian ship. It does not do so save as regards merchant shipping matters, under 57 and 58 Vict. c. 60, s. 735; see *Responsible Government*, ii. 1200 seq.

While the legal position is now clear, and established on a constitutional basis, the question of the policy of naval defence is still one which is wholly undecided. The attitude of Canada may be dismissed in a few words: down to 1909 the Dominion declined to consider naval defence as incumbent on her resources: the use of Imperial ships was requisitioned for the purpose of protecting the fisheries from American depredations in the years after the abrogation of the Reciprocity Treaty of 1854, and again after the termination of the Treaty of Washington, and the Imperial Government doubtless felt that a certain advantage was derived from this fact in that it enabled them to regulate precisely the amount of armed action to be taken in an international matter of great difficulty. Newfoundland also was patrolled by British men-of-war to secure that the fishery rights of the French and the American fishermen were not violated by the Newfoundlanders, nor, on the other hand, exceeded by the foreigners. In both the Dominion and Newfoundland ships were in time provided for fishery protection purposes, but these were not vessels of war: similarly, Canada had vessels on the great lakes with a light armament, but these again were not to be reckoned as naval vessels proper, and their discipline was regulated by an Act regarding Government vessels,[1] not by a naval defence Act, though these vessels in their pursuit of foreign fishing vessels encroaching on Canadian limits were accorded by the Canadian courts the privileges of hot pursuit,[2] when it was contended that the limited and territorial character of Canadian jurisdiction rendered the action of the captains outside territorial waters *ultra vires vis-à-vis* a foreign ship.

In the case of Australia an intercolonial conference of 1881 decided that the duty of maintaining the Imperial Navy should rest on the Imperial Government, which ought at its own cost to defend Australia by sea. The conference also pressed for an increase in the strength of the squadron kept on the coast. The Admiralty naturally did not appreciate

[1] *Revised Statutes*, 1906, c. 111.

[2] *The Ship 'North' v. The King*, 37 S.C.R. 385.

these views, from which, it is noteworthy, South Australia dissented, and in 1886 commissioned Rear-Admiral Tryon, then commanding on the Australian station, to negotiate with the Governments on the question. The result of these negotiations, which were brought to a close at the Colonial Conference of 1887, was the agreement of the Australian colonies to contribute £126,000 and New Zealand to contribute £20,000 towards the provision of five fast cruisers and two torpedo boats for the protection of floating commerce in Australian waters, two vessels to be kept in New Zealand waters either from these vessels or from the normal Imperial squadron which was to be continued. The agreement was for a period of ten years, and in 1897 it was simply renewed; but in the following year the Cape of Good Hope made without conditions a present of £30,000 a year to the Imperial Navy. In 1902 the policy of the Imperial Government was fully explained by Lord Selborne in a memorandum laid before the Colonial Conference.[1] The essence of the memorandum was that the Navy existed for offensive purposes, not for defence, and that separate local defence navies were a mere blunder, fatal if the enemy adopted proper strategy and attacked each portion in detail. Moreover, he insisted on the absolute necessity of one control. The result of the discussions, as modified later, was that the Australian contribution now paid by the Commonwealth was increased to £200,000 and the New Zealand to £40,000, that it was agreed to keep in Australian waters, with power to operate in China and East Indian waters, a force of one first-class cruiser, three second-class cruisers, and five third-class cruisers, two in commission, and three partly manned as drill ships, and to establish branches of the Royal Naval Reserve in each Dominion, which were only to be called out on the advice of the two governments concerned. One vessel and the drill ships were to be manned by colonial seamen at special rates of pay, commanded by officers of the Royal Navy and of the naval reserve, and one drill ship and one other cruiser were

[1] *Parl. Pap.*, Cd. 1297 and 1597 (Lord Selborne's memorandum). Cf. C. 8596.

normally to be in New Zealand waters. Further ships were to be supplied if needed. At the same time the Cape gave £20,000 a year more and Natal began a gift of £35,000 a year without conditions of any kind. Newfoundland gave £3,000 a year with a single payment of £1,800 for fitting up a ship, for the sake of having a royal naval reserve of 600 men.

The next six years witnessed the development in the Commonwealth of the desire for an independent navy of their own, a desire which nearly led to the rejection of the agreement arranged in 1902, which, however, finally became law in 1903. The Director of the naval forces of the Commonwealth put forward a scheme for the local defence of Australia by means of cruiser destroyers, torpedo-boat destroyers, and torpedo boats, and as this scheme seemed to be within the means of the Commonwealth, and as it seemed to promise the satisfaction of the *amour propre* of Australia, it was pressed by Mr. Deakin on the acceptance of the Admiralty, which on the other hand insisted that the real aim of naval policy must be attack, that defence tactics were erroneous, and that the only result of the local navy policy would be dissipation of resources. In 1907, at the Colonial Conference[1] of that year, the First Lord of the Admiralty asked for aid in the maintenance of the Navy if the Colonies saw their way to give it, but he insisted that the unity of the sea and of the Empire entailed the unity of naval control, and he acknowledged the absolute obligation of the United Kingdom to defend the oversea Dominions to the best of its ability even if they would not help. Australia, through Mr. Deakin, pressed the case for a local navy, urging that the disadvantages of divided control could be exaggerated, but he made it clear that, the defence being local, even in war the control would be vested in the Commonwealth Government. Dr. Smartt, for the Cape, proposed a motion recognizing simply the duty of giving help by a grant of money, or by a local navy, as the case might be, but Sir Wilfrid Laurier objected to the recognition of any obligation at all. The Admiralty were not anxious

[1] *Parl. Pap.*, Cd. 3523.

to see the agreement of 1902 upset; they were ready to agree to it if desired, but made it clear that in that case they would resume full liberty to post their ships as strategy required, and not as pleased Australian opinion. Nothing, therefore, was done, and in 1908 the duel between Mr. Deakin and the Admiralty went on: Mr. Deakin suggested the setting up of a local flotilla of destroyers and submersibles, and the raising of 1,000 Australian seamen, to which should be added two cruisers lent by the Admiralty to train the naval militia, and two cruisers maintained by the Admiralty, on which 400 of the seamen provided by Australia would serve, but he still declined to hand over complete control of the flotilla in any event, though he believed that the control would normally be transferred by the Government. The Government of New Zealand, however, made an increase of £60,000 a year in its contribution without conditions, and the Cape started a branch of the royal naval volunteer reserve, paying the cost from its grant to the Imperial Navy.

The revelations of the dangerous situation of foreign politics and the growth of the German Navy in the speeches of the Prime Minister and First Lord on March 16, 1909, led to a response from the Dominions.[1] New Zealand offered one or two Dreadnoughts. Canada agreed to organize a Canadian naval force, recognizing the necessity of the naval supremacy of Britain to the security of commerce, the safety of the Empire, and the peace of the world. Australia, now under Mr. Fisher, offered the continuance of the naval agreement to the end of its due term of ten years and the creation of a naval force which would in war automatically fall under the Imperial Government, and in peace when outside Australian waters would fall under the command of any senior naval officer. This offer did not satisfy the Commonwealth generally. New South Wales and Victoria offered to supply Dreadnoughts, and a general change of feeling returned a new coalition Government to power, pledged to some such policy. The result was the opening of a Naval and Military Conference.

[1] *Parl. Pap.*, Cd. 4948.

which sat in London from July 28 to August 19, 1909, and which decided in favour of the creation of three naval units, one in Australian waters, one in China waters, and one in the East Indies. Each unit was to consist of a cruiser of the *Indomitable* type, three second-class cruisers, and six destroyers with three submarines. The battle cruiser of the China squadron was to be provided by New Zealand, which was to continue its payment of £100,000 a year, while Australia was to provide a whole unit, and the Imperial Government to provide the rest. Part of the China squadron was normally to be in New Zealand waters. Canada was to commence the construction of a local fleet, with cruisers of the *Bristol* class and destroyers.

The Commonwealth of Australia set at once about the carrying out of the programme of defence, arranging to have one of the cruisers constructed in Australia from materials sent out and placing orders for the other vessels. In 1911 the Imperial Conference[1] dealt further with the international questions arising out of the use of the Dominion fleets in their new form, and agreed upon a simple set of rules. Separate stations were marked out for the operations of the fleets of Canada and the Commonwealth, in which these governments were to control their own ships entirely. Their ships should fly the white ensign at the stern, and the characteristic flag of the Dominion at the jack-staff. Notice should be given to the Admiralty when any Dominion ship was to be sent out of its station, and if the destination was a foreign port the concurrence of the Imperial Government must be obtained. When at a foreign port the Commander of a Dominion ship was, as regards international matters, to obey the instructions of the Imperial Government, and to report his proceedings to the Admiralty or the British Commander-in-chief. If a ship of the Admiralty should meet a Dominion ship the senior officer would take command in matters of ceremony or international courtesy, but should have no power to control the movements of the other ship, unless united action were agreed on, when the senior naval officer

[1] *Parl. Pap.*, Cd. 5746, II.

would command, but not interfere needlessly in internal matters on the other ship. The necessary officers were to be lent to the Dominions, the commissions[1] of officers were to run by their dates when given by any of the Governments, and the officers were to be shown in the Navy List. The Governments were to keep one another informed of all changes in rules of discipline, the Dominions having applied the Imperial rules in principle to their forces.

The Commonwealth obtained, in pursuance of their scheme, in 1911, a report from Admiral Sir R. Henderson[2] in which he planned the development of a great Commonwealth fleet to consist in 1933 of eight armoured cruisers, ten protected cruisers, eighteen destroyers, twelve submarines, three dépôt ships, and one fleet repair ship, at a cost of £23,290,000 and an annual expenditure in 1933 of £4,794,000, and an additional expenditure of £40,000,000 on docks. The personnel for such a fleet would be about 15,000, costing £2,226,000 a year, and six naval bases and eleven sub-bases would be required.

Canada had obtained by purchase from the British Government the vessels *Niobe* and *Rainbow*, both of very little fighting value, and had allowed the *Niobe* to be gravely damaged by sending it to a dangerous port in order to gratify a local supporter of the Government, while the *Rainbow* had caused legitimate surprise by sailing fast enough to catch a foreign fishing vessel which was not at anchor. The fall of the Liberal Government found the contracts for new vessels which had been called for unawarded, and the Conservative Government came to the not unnatural conclusion that there would be little but needless expense involved in the continuance of the project.[3] This was the position when the speech of the First Lord of the Admiralty in the House of Commons on July 22, 1912, explained the

[1] A common form of commission was agreed on in principle to be applicable to all the naval forces.

[2] *Parl. Pap.*, Cd. 6091, p. 15.

[3] Canada *House of Commons Debates*, March 18, 1912; *Parl. Pap.*, Cd. 6091, pp. 14, 15.

nature of the danger to the Empire involved in the rapid and unexpected growth of the German Navy, and the building of Dreadnoughts by other powers, including Austria-Hungary and Italy. The question of naval defence naturally formed part of the matters discussed with the Prime Minister of Canada on his visit to England in 1912, and on December 5, 1912, Mr. Borden laid on the table of the House of Commons of Canada a memorandum [1] on naval requirements for Imperial defence prepared by the Admiralty at the request of Mr. Borden. In this document stress was laid on the fact that the Admiralty did not wish to put any pressure on Canadian public opinion or seek to influence the Dominion Parliament in a decision which solely belonged to Canada, and that the Imperial Government were prepared from their own resources to supply whatever was needed for Imperial defence. It was pointed out that aid now given was not a mere question of ships and money, but a testimony to the united strength of the Empire, and the resolve of the oversea Dominions to maintain its integrity. The answer to the question of Mr. Borden as to the most effective means of help was that it should take the form of the provision of a certain number of the largest and strongest ships of war which science could build or mone[illegible]y. In view of this advice Mr. Borden asked the Par[illegible] to vote a sum of thirty-five million dollars for the purpose of constructing three battleships or battle cruisers of the first strength to be placed at the disposal of the Admiralty, but to be re-transferred to Canada if Canada should decide to set up its own Navy. He pointed out that Canada had made no direct contribution to naval defence hitherto, and that the naval expenditure of the United Kingdom from 1870 to 1890 on Canada was from twenty-five to thirty millions, and the military expenditure from 1853 to 1903 about twenty-three millions.

The proposal was bitterly resisted by the Liberal Opposition in the Commons. Sir Wilfrid Laurier urged that the proper policy required at least the verdict of the electorate, while Mr. Borden referred to his own action in February

[1] *Parl. Pap.*, Cd. 6513; cf. Cd. 6689.

1910 in moving a direct contribution of a sum equal to the cost of two battleships as showing his views. The situation was urgent, and a local Navy would be a matter of long delay. The ships now given could be recalled when Canada desired a local force, subject to reasonable notice. The amendment in favour of reference to the people was defeated by 122 to seventy-five votes, and that of Sir Wilfrid Laurier in favour of the creation of two Canadian squadrons by the same figures, and the second reading of the Bill was ultimately passed by 114 to eighty-four votes, there being voting against the Government by some French-Canadian members. The further progress of the measure was systematically obstructed, and it was only by dint of passing a closure rule that the third reading could be passed. The Senate, however, in the exercise of its discretion, declined to pass the measure by a party vote of fifty-one to twenty-seven votes, on the ground that it should be referred to the people. The decision was by no means altogether expected, as the patriotism of Sir George Ross, the leader of the Senate, was relied upon to overcome his objections, on party grounds, to the measure. It was rumoured, however, that the failure to reject the Bill would bring about the resignation of Sir Wilfrid Laurier, and the patriotic members of the Senate felt that they could not desert the leader of the party in his day of defeat. But the episode was deeply to be regretted: Sir George Ross was happy enough not to live to see the day when the failure of Canada might well be thought to have encouraged the attacks of Germany; and the Senate of the Dominion completed its course of blind partisanship by its rejection of a measure which it had not the slightest right to refuse, and which had it been the House of Lords in the United Kingdom it could not have touched. The irony of a constitution which put such power into the hands of a body of partisan nominees, most of absolutely no distinction of character or intellect, can hardly be excelled.[1]

In the meantime the Imperial Government, profiting from the Imperial spirit of Sir Robert Borden and from his mani-

[1] See *Canadian Annual Review*, 1912, pp. 48 seq., 1913, pp. 148 seq.

fest readiness to depart from the particularism [1] of his predecessor, had taken a step of the highest importance and interest. On December 10, 1912,[2] the Secretary of State for the Colonies addressed a dispatch to the Governors-General of Australia, and the Union of South Africa, and to the Governors of New Zealand and Newfoundland on the subject of the representation of the Dominions on the Committee of Imperial Defence. This dispatch communicated the text of resolutions which had been adopted on May 30, 1911, at a meeting of the Committee of Imperial Defence, and which were to the effect that one or more representatives appointed by the respective Governments of the Dominions should be invited to attend meetings of the Committee of Imperial Defence, when questions of naval and military defence affecting the oversea Dominions were under consideration, and that the proposal that a Defence Committee should be established in each Dominion was accepted in principle. It was stated that the Canadian Government having changed in the Autumn of 1911, it was necessary to put the proposals before Mr. Borden and his colleagues when they visited London in 1912, and that Mr. Borden had provisionally accepted the resolutions and had stated that he saw no difficulty in a minister of the Dominion Government spending some months of every year in London, in order to carry out the intention. Mr. Borden had also expressed the desire that the Canadian and other Dominions ministers who might be in London as members of the Committee of Imperial Defence should receive in confidence knowledge of the policy and proceedings of the Imperial Government in foreign and other affairs. It had been pointed out to Mr. Borden that the Committee of Imperial Defence was a purely advisory body and could not become a body deciding on policy, which must remain the sole prerogative of the Cabinet, subject to the support of the House of Commons. But any Dominions minister resident in the United Kingdom would

[1] Still firmly maintained by Sir W. Laurier; see *Round Table*, 1915, pp. 430 seq.

[2] *Parl. Pap.*, Cd. 6560.

at all times have free and full access to the Prime Minister and the Secretaries of State for Foreign and Colonial Affairs for information on all questions of Imperial policy. From Mr. Borden's speech in introducing the Canadian Naval Bill, it appeared that he accepted the proposals, and the same offer was open to all the other self-governing Dominions if they wished to adopt it, but it could be varied in the case of each or any Dominion to suit their wishes or the special circumstances of their case.

The position of the Imperial Government was further explained by Mr. L. Harcourt, the Secretary of State for the Colonies, in a speech which he delivered in his constituency on October 25.[1] In this speech he pointed out that there was on the part of the Canadian Government and people a natural and laudable desire for a greater measure of consultation and co-operation with the Imperial Government in the future than they had had in the past. This was not intended to, and need not, open up those difficult problems of Imperial Federation, which, seeming to entail questions of taxation and representation, had made that policy for many years a dead issue. Speaking for himself he saw no obstacle, and certainly no objection, to the Governments of all the Dominions being given at once a larger share in the executive direction of matters of defence, and in personal consultation and co-operation with those individual British ministers whose duty it was to frame policy in the United Kingdom. He would welcome a more continuous representation of the ministers of the self-governing Dominions, if they so wished, upon the Committee of Imperial Defence, and the Imperial Government would be glad if a member or members of those Cabinets could be annually in London. The door of fellowship and friendship was always open and no formalities of an Imperial Conference were required for the continuity of Imperial confidence.

[1] In a speech on March 15, 1910, Lord Crewe similarly urged that the Dominions should take a greater part and interest in British diplomatic affairs and problems, and urged co-operation and common action in these matters: *Canadian Annual Review*, 1910, p. 89.

In reply to the dispatch from the Secretary of State the Government of the Commonwealth on December 19, 1912, suggested a subsidiary conference on Naval Defence to be held in January or February 1913 in Australia, New Zealand, South Africa or Vancouver. In answer it was pointed out by Mr. Harcourt that it would not be possible to hold a general Conference at the places suggested on the date named. The other Dominion Governments could not attend a Conference on such short notice, and it was doubtful whether they would wish a general Conference. The Minister of Defence of New Zealand was on his way to the United Kingdom, and in May the Minister of Defence of South Africa was due for consultation. It was therefore suggested that after the general election due in May the Defence Minister of the Commonwealth should visit England. To this proposal no reply was then made. The views of the Government of the Union, as conveyed in a minute of January 30, 1913, were that the existing machinery for consultation and suggestion, in the shape of the Imperial Defence Committee and the Overseas Defence Committee, had worked so smoothly that they doubted if it were desirable to inaugurate any new departure which might in the end prove less satisfactory in practice. In particular they doubted whether the idea of a minister of the Union residing in London for the purpose of constantly representing the Union Government on the Imperial Defence Committee was practicable. As long as the control of foreign policy remained, as under present conditions it must necessarily remain, solely with the Imperial Government, and the Imperial Government continued, as agreed at the last Imperial Conference, to consult the Dominions on all questions of foreign policy which affected them individually, they did not think it necessary to have a minister in constant attendance at the Imperial Defence Committee. It was always open to the Union Government either to seek advice from the Imperial Defence Committee in writing or in more important cases to ask for personal consultation between that Committee and the representative of the Union Government.

In the later case, undoubtedly the more convenient course, at any rate as far as the Union was concerned, would be that either the Prime Minister, or minister or ministers whose departments were more especially concerned, should visit London for the purpose of such consultation. The Government of Newfoundland saw no difficulty in ministers when in London placing themselves in touch with the Imperial Defence Committee. The Government of New Zealand stated that they did not consider it advisable at the time for a permanent appointment to be made to represent the Dominion in London, but preferred that when accredited ministers of the Government of the Dominion were in England they should be invited to attend the deliberations of the Committee of Imperial Defence, as had been the privilege of the Dominion minister of defence during his recent visit to the United Kingdom.

The visit of Colonel Allen on behalf of the Dominion had arisen out of the comparative failure of the Imperial Government to carry out its share of the agreement of 1909.[1] In 1912 the Government of Mr. Mackenzie agreed to permit the retention of the *New Zealand*, constructed at the cost of the Dominion, in European waters, on the strength of representations by the Imperial Government that it was required there. This action was fully concurred in by the Conservative administration which succeeded Mr. Mackenzie's Government, but Colonel Allen was sent to England to consider whether some steps could not be taken to make effective the remainder of the agreement. He found that the Imperial Government were faced with such a change of naval conditions that the two cruisers of the *Bristol* class which they had intended to send to New Zealand waters could not be spared, being required for the China Station, and the Minister of Defence accordingly suggested that New Zealand should begin training her own personnel on a seagoing ship to be lent by the Admiralty, with the necessary crew and officers, that in addition two light cruisers be placed in the waters of New Zealand by the Admiralty, and

[1] *Parl. Pap.*, Cd. 6863, p. 11.

that the Dominion should purchase a cruiser of the *Melbourne* type as being specially suited for the defence of commerce. The New Zealand Government, however, decided that more than this should be done, and therefore determined to secure a cruiser of the *Bristol* class, 4,000 tons, costing £400,000, and to take over from the Admiralty the *Philomel*, 2,575 tons, as a training ship. Recruits could easily be obtained from both the European and native population, and a career would be open for them in the ships of the Royal Navy as well as in any New Zealand ships. Officers would be supplied by cadets, of whom two would pass through Osborne or Dartmouth every year, and eight through the Royal Australian Naval College, founded by the Commonwealth Government for the training of naval officers, and recognized by the Admiralty. The administration of any New Zealand ships should be entirely under the Dominion in peace, but would pass in war automatically to the Admiralty, and would be transferable to the Admiralty if risk of war were apparent. The Government recognized the essential necessity of unity of control of the Fleet in war or in anticipation of war, and the necessity of similarity of discipline, and they were prepared to face the necessary cost in view of the necessity of keeping naval supremacy in the Pacific. The combined action of the United Kingdom and the Dominions would result in securing the position desired.

The proposals of the Government were accepted by Parliament, though only by a majority, as the Opposition under Sir J. Ward would have preferred the retention of the older policy with its more defined pecuniary liability. The Act, No. 45 of 1913,[1] makes provision for the raising by voluntary enlistment of a force and for its discipline applying the *Naval Discipline Acts*, the King's Regulations and Admiralty Instructions to the force subject to the Act, and to any modification and adaptations prescribed by regulations under the Act, to the forces raised by New Zealand. As in the case of the Commonwealth Act of 1912, the making of the application of the Imperial Act of 1911 subject to

[1] *Parl. Pap.*, Cd. 7057, pp. 79 seq.

modification must be deemed as a mistake, and to render it not free from doubt whether, in point of law, the Act has ever been applied to the forces at all. It is, however, expressly provided that on the declaration of war between Great Britain and any other country or countries, or on the outbreak of hostilities, the ships and forces shall pass immediately under the disposition of the Government of Great Britain, and the officers and men shall be subject to all the regulations affecting the King's Navy, for the period of the war, while even without actual war the Governor, if he thinks it expedient to do so in the interest of Great Britain, or is requested by the Government of Great Britain to do so, or when war is imminent, can by proclamation transfer the ships and men to the British Government for such time as he thinks fit. Needless to say, this power is one not given personally to the Governor, for it is to be exercised by proclamation, which implies ministerial responsibility.

In the meantime, the Government of the Commonwealth had suffered defeat at the general election and a new Ministry, that of Mr. Cook, had taken its place. On August 16 the Government telegraphed that they were considering the Naval Defence situation, especially the arrangement arrived at by the Imperial Conference in 1909, by which three Fleet units were to be formed to make an Eastern Fleet for the Empire. The Australian Fleet unit as agreed to was nearly ready, but it did not appear that the China and East Indies units were in course of being provided. The Government inquired the intentions of His Majesty's Government in this respect: if any new circumstances had arisen to render a change of plan desirable, the Government would be glad to be informed of them, and, if thought necessary, would arrange to be represented at a Conference, should His Majesty's Government consider such a course necessary. In reply, the Commonwealth Government were informed of the views of the Admiralty as to the possibility of adhering to the proposals of 1909, and it was added that if, after consideration of the statement of the Admiralty, the Government considered it desirable to confer, as the Governments of

other Dominions had done, with His Majesty's Government, His Majesty's Government would be glad to welcome, at any date convenient to them next year, a visit of representatives of the Commonwealth Government. To this remark no reply was received, but as it appeared from a question and answer in the Commonwealth Parliament of October 10, that the Commonwealth Government thought that such an invitation to the Imperial Government to convene a Conference had been sent, the Secretary of State pointed out in a dispatch of November 21, that such an invitation had not been received, as it was not contained in the telegram from the Government of August 16. In a telegram of February 9, 1914, it was explained that the telegram of August 16 had been intended to be such an invitation. The Imperial Government then offered to receive representatives of Australia for conference forthwith, and proposed to include New Zealand in its scope, but the proposal fell through as the Commonwealth Government could not send a representative, the session being about to open.

The correspondence is of some importance, as it shows that the attacks made on the Imperial Government for failure to summon a Conference were not justified. The truth was, no doubt, that the Commonwealth Government, with a majority of the Speaker in the Lower House and a minority of twenty-nine in the Upper, was not in a position to spare a minister, and was therefore more anxious to placate its opponents by throwing the onus on the United Kingdom. It is otherwise impossible to explain why the Government never, from August 16 to February 9, reminded the Imperial Government of their request, and why, after the receipt of the dispatch of November 21 at the end of December, it took some six weeks to send a reply of a few words stating a fact. The occurrence of more grave events has doubtless effaced the memory of this episode, but it is worthy of record as a striking example of the use of unfair tactics against the Imperial Government, as a device of a party in a difficult situation to avoid admitting its own defects.

Just at the moment when the proposal of a Conference

between the United Kingdom, New Zealand, and the Commonwealth was breaking down on the inability of the Commonwealth to send a representative, a new and very important pronouncement on the relations of the Dominions and the Mother Country in matters of naval policy was made by the First Lord of the Admiralty in the House of Commons on March 17, 1914.[1] Mr. Churchill explained that the views of the Admiralty as to the need for Canada, in common with other Dominions of the Crown, taking effective part in the defence of the Empire, had been expounded in the memorandum of August 1912, and the case there set out had been strengthened by the lapse of time, and constituted an absolute justification for prompt Canadian action. In July 1912, after considering the problem of Naval Defence in the Mediterranean, it had been decided that a British battle squadron should be maintained there, with a view to protecting the important and long established British interests in the Mediterranean without incurring any exceptional obligations in any direction. It had been decided, therefore, to place there at the end of 1915 a battle squadron based on Malta of eight battleships, including six of the *Lord Nelson* type. For this purpose it was necessary that the three Canadian ships should have been laid down in June 1913 and in the place of that it had been necessary to accelerate three ships of the British programme, by beginning them eight or nine months earlier than was originally proposed. By this acceleration, involving a vote of £437,000, it would be possible to keep the proposed squadron in the Mediterranean from the latter part of 1915 to the middle of 1916. The Canadian Government could not renew the Naval Aid Bill, and so no new ships could be begun in 1914. It was therefore necessary to repeat on a smaller scale the course followed in the previous year, and to accelerate the work on two ships of the 1914 programme, so as to have them ready in the third quarter of 1916: it was not necessary to increase the rate to three, as in 1913 the programme gave an excess of one ship, available for the whole world programme

[1] Foreshadowed in part in his similar statement of July 17, 1913.

service, and that gain would be repeated in 1915, so that in that year, if Canada still delayed, the position in the Mediterranean could be maintained by the acceleration of but one ship. There were, however, good prospects that the Canadian deadlock might be relieved by one party or the other, or best of all by joint action. The wealth and interest of Canada rendered it right that she should make some provision for her own naval defence, as much as would be required if she were annexed to the United States or were independent, and he did not wonder that Canadians of every party felt it beneath the dignity of the Dominion to depend entirely on the exertions of the British taxpayer, many of whom were much poorer than the average Canadian.

In the Pacific the naval power of the Empire secured Australia and New Zealand from all danger from any European power, and also at present from Japan. While the Japanese alliance lasted, Japan was safe from attack by sea by the great fleets of Europe, and in no other way could it protect itself in the years immediately to come from the dangers of European interference. Moreover, the reasons which made Japan contract and renew the alliance would grow stronger with time, and the growth of European interests in China, and the development of European navies on a scale which Japan could not afford to imitate. The alliance required England to maintain in the China sea a force superior to any other European power, and thus provided against any danger to Japan from a gradual increase of European squadrons in the far east. As regards the naval agreement of 1909 with Australia and New Zealand, the central principle was that His Majesty's Government should maintain in the Pacific and Indian Oceans double the force of the Australian flotilla. More than that was being done, but not in the same form as had been proposed. The proposed battle cruisers were being kept at home, where alone they would meet their equals, and on the China and Indian stations had been placed two battleships and other armoured cruisers which were quite sufficient for the work they had to do, and which were not merely an equivalent but an improve-

ment upon the mere duplication of the Australian Fleet unit. The alliance with Japan had been renewed with the concurrence of the oversea Dominions until 1921, and it was not expected that after that date Japan would have less need of a powerful friend at the other side of the world, which would continue to be the foremost naval power. Apart from the good sense and moderation of the Japanese Government, and from the mutual benefits rendered, there was a strong continuing bond of interest on both sides which was a true and effective protection for the safety of Australia and New Zealand. If the British Fleet were defeated in the North Sea, there were no forces to prevent territorial expansion of a European power in the Pacific, and similarly against Japan there were no means by which for the next ten or twelve years Australia and New Zealand could expect to preserve themselves single-handed, and their only course would be to seek the protection of the United States.[1] From this point of view the profound wisdom of the naval policy of New Zealand could be appreciated in giving the *New Zealand* to strengthen the British Navy at a decisive point. The Dominion of New Zealand had thus provided in the most effective way alike for her own and for the common security. The situation of the Pacific would be absolutely regulated by the decision in European waters; two or three Australian or New Zealand Dreadnoughts, if brought into line in the decisive theatre, might turn the scale and make victory not merely certain but complete, but the same vessels in Australian waters would be useless the day after the defeat of the British Navy in home waters, and their existence would only serve to prolong the agony without altering the course of events. Their effectiveness would have been destroyed by events which had taken place on the other side of the globe, just as surely as if they had been sunk in the battle. The Admiralty were bound to uphold the broad principles of unity in command, but their responsibilities ceased when the

[1] In 1915 in New Zealand feeling against the failure of the United States to protest against the violation of Belgium ran strong: *Round Table*, 1915, p. 492.

facts had been put before the Dominions. It was recognized that time would be required before the principles of naval strategy were applied to their full extent in the Dominions. The Dominions wished to have ships under their own control, which they could see and touch, and these feelings were facts which would govern events. There were at present insuperable difficulties in enlisting the active co-operation of the Dominions in naval defence by means of ships which they rarely saw, and which were absorbed in the great fleets of Britain at the other end of the world. The Admiralty had therefore co-operated to the best of their ability in the development of the Australian Fleet unit: they regarded the effort which the Commonwealth were making as heroic, and would leave nothing undone to make it a complete success. A sound agreement had been made between the Admiralty and the Commonwealth, relating to the use of the Commonwealth Fleet in war; the importance of creating a naval sentiment in the Dominions, and of creating a reserve of personnel and local naval establishments was realized, and the design of an Imperial squadron had been conceived, with the object of combining sound military principles with local aspirations. There should be developed severally in Canadian, Australian and South African waters a naval establishment with docks, defences and repairing plant, which would enable the Imperial squadron to operate in its theatre for a prolonged period. In the second place, local defence flotillas should be developed, both destroyers and submarines, to defend the bases and establishments, and co-operating with the Imperial squadron. In the third place, the Dominion should maintain local light cruisers to co-operate with the fleet on its arrival, and also to protect commerce in their own waters. In this way a true distinction would be made between the services which were essentially local and those necessarily of general Imperial character. The Dominions would be afforded the individual local development which was necessary to arouse and maintain keen naval interest and to procure the sacrifices necessary for the maintenance and development of that naval power, while by

sending any capital ships to the Imperial squadron they would create a really strong, effective naval force, not one or two ships isolated on particular stations, which could move rapidly and freely about the world, bringing aid in sufficient strength wherever aid might be needed in time of war.

The answer of the Commonwealth Government to Mr. Churchill's speech was made in the form of a memorandum circulated by the Minister of Defence of April 13, 1914. The effect of the document was that alliances were uncertain, and preparations should be made in good time. The attitude of the Admiralty had changed since 1909, when they were encouraged to found a fleet unit, charged primarily with the protection of British interests in the Pacific, and with relieving the Royal Navy of part of its burden of responsibility. That aspect had reconciled many supporters of the contribution policy to support the unit scheme, and the new proposals destroyed the ideal of a joint Imperial Fleet working for common ends and discharging a common Imperial responsibility. Australian opinion would neither find the men nor money for the dispatch of Australian battle cruisers to European waters. But even if the ultimate success of such a battle squadron as was suggested was admitted, it was clear that the Australian forces, as they were, were no more than adequate to provide experience for the creation of that organization, without which, in time of war, a fleet would be worse than useless. It was open to question whether it was wise in the interests of the Empire to rely on the ability of the Admiralty to send to a sphere of danger, at least four or five weeks distant from Europe, a powerful fleet to meet any emergency that might arise. In any case, the Australian scheme provided the essential nucleus for such a fleet. Naval bases could only be kept efficient by constant use by every type of vessel which was likely to require their aid, and without an adequate fleet there could be no effective training of officers and men. The minister emphasized the difficulty caused by apparent change of policy on the part of the Admiralty, and pressed for the convening of a general Conference in 1915.

The question thus raised is, it is clear, one of the highest importance to the future of the Empire, though it has no essential relation to its unity. It is perfectly possible to hold that the existence of allied fleets on the basis of the 1909 arrangements would work satisfactorily for the defence of the Empire, in so far as it is quite possible that the necessary similarity of discipline and training and tactics, which is essential for really effective combined action in time of war, could be obtained by the adoption of similar rules and frequent exchanges between the Australian and the British Navy. The Australian Navy is at present in effect a British Navy, nor is it probable that there would be in any time which can reasonably be foreseen a fundamental change in this regard. But this consideration does not dispose of the argument from principles of strategy. It is certain that, if any naval force is not on strategical grounds needed in any place, it is being wasted, and not even Australia can afford to waste money,[1] even if it felt inclined to do so, having regard to the very severe strain on British finances of the cost of the Navy, and this consideration must tell more and more effectively in both countries in view of the drain of strength in the European War. The Admiralty should clearly have the control of the movements of the capital ships of the fleet, and direct their movements in immediate touch with the principles of foreign politics, as conveyed by the Imperial Government to its technical advisers. The argument of Senator Millen that it is not wise to trust the Admiralty to be able to send a strong squadron to a threatened point in proper time, which is of course an allusion to a sudden attack from Japan, is based on a view of foreign politics which is fundamentally unsound. The war with Germany arose indeed in a very brief period, but from 1909 the danger had been realized, and from 1912 it had been recognized to have become more serious. It was hoped by the Government and by every sober man to avoid war, but the dispositions of the Admiralty throughout this period, and the magnificent

[1] Her defence expenditure in 1913–14 was £4,752,735 for a population under five millions; cf. *Round Table*, 1915, p. 451; 1915–16, pp. 168–75.

preparation shown at the hour of the emergency of the Empire, prove that the views of the Government of the Commonwealth as to the probability that a sudden attack could be made on Australia, which the British Fleet could not be ready to counter, are based on no reasonable foundation. It is perfectly plain that if no precautions at all are ever to be taken, if British naval strategy has no relation to diplomacy, then the only means of attaining security must be to scatter ships widespread throughout the world, in sufficient numbers to meet any attack. It is hardly to be seriously supposed that this is possible: certainly it is not possible for Australia to accomplish. In the meantime, what useful purpose would be served by one battle cruiser against the theoretical strong invading force which it is supposed might assail Australia when the Admiralty were so unsuspicious of danger as to have nothing nearer than four or five weeks' steaming? It is certain that if at any time the Japanese alliance comes to an end,[1] there will be grave need for the placing in the Pacific of a great battle fleet, though its main habitat would hardly be the coasts of the Commonwealth, but in the meantime, every sound principle makes it right not to provide against a conceivable danger and to ignore a real danger. The actual events of the war have been hailed in some quarters in the Commonwealth as a proof of the wisdom of the Commonwealth policy. Nothing could be further from the truth than this conception. The only difference, which the carrying out of the agreement of 1909 in its full shape would have made, would have consisted in the presence of two fewer Dreadnoughts at the heart of the Empire in the days of the greatest need of the Empire: as it was the *Australia* was away, where she had no work to do worth her power and strength, and had to be brought back to British waters, and the much dreaded Japanese undertook much of the important work of the protection of the Pacific against the German squadron The aid of Japan in the movements of ships and men in the east has been effectively acknowledged by the

[1] On Oct. 15, 1915, Japan adhered to the agreement of England, Russia, and France to conclude no separate peace; *Parl. Pap.*, Cd. 8107.

First Lord of the Admiralty, and it may be hoped that the co-operation in this naval action may serve in some degree to mitigate the unreasoning attitude of Australia towards the empire of Japan.[1] It must be remembered that the exaggerated fear of Japan which forbids the calm weighing of the position is due to an altogether not unreasonable reaction from the foolish complacency with which Australia used to regard her isolation. Until the Russo-Japanese War it is doubtful if any large number of people in the Commonwealth realized the factors of international politics, and, when that war wakened them with a rude shock to the possibilities of danger, the reaction urged by the *Bulletin* led the popular mind beyond due limits

It is also to be borne in mind that the success of the operations of the Australian fleet in the Pacific was the success, not of the direction of the Commonwealth Government, but of the Imperial Admiralty, to whose control the fleet passed at once on the outbreak of war, first *de facto* and then formally under transfer by the Commonwealth Government. The action of the Commonwealth was wise and inevitable, but it shows that there is no ground to use this case as proof of the possibility of successful action by separate naval forces. The loss of time, which is inevitable in every case of dual control, is by itself a most potent argument against any division of responsibility in war time. The effective action of the British forces with the Japanese forces and with each other was possible merely because the Admiralty in London and the Commander-in-chief in the Pacific were sole masters of the situation, and could plan and arrange without heeding more than was in their opinion desirable the representations of the Dominion ministers.

It is, however, right to give some weight to Senator Millen's arguments from the necessity of the Commonwealth seeing its naval forces if it is to be prepared to provide the men and money for them. In part the argument is answered by the fact that the Commonwealth would be expected, under the

[1] The policy of New Zealand has changed; *Round Table*, 1915, p. 490.

scheme of the Admiralty, to own not merely great naval bases, but also cruisers and minor vessels such as submarines and destroyers for local action. This part of the scheme would thus give the Commonwealth as much as was ever aimed at by Mr. Deakin, and, what is more, give it as the Commonwealth's own fleet. Much therefore of the money that, on the plan of Sir R. Henderson, which seems still to hold the field in the Commonwealth, is to be spent would still be spent locally, and that this is an important consideration is of course recognized. The remaining sums would be spent as thought fit from time to time in providing and preferably equipping and maintaining a Dreadnought or more, to form part of a squadron for Imperial purposes, which would be based, it is suggested, on Gibraltar, but would be always ready to move to any part of the world where its services were needed, and in time of peace would of course visit the Dominions, in order that the Dominions should see their ships and be encouraged to take an interest in the fleet. It is difficult, apart from considerations of the expenditure of money in Australia, to see the difficulty of recognizing the fine aspect of a fleet of this kind, which would surely be a more effective sign of Imperial strength than odd battleships scattered over the Empire. Nor is it possible to understand how the men would suffer : it has always been part of every scheme that there should be free interchange of men to secure full training, and that the Australian men and officers should not be restricted to an Australian career only, and it is therefore not easy to see how it can be contended that the attraction to an Australian to join the Navy is that he may cruise in an enormous Dreadnought about the coast of the Commonwealth. The presence of the battle-cruiser always on the coast is a poor ideal to be represented as the aim of Australia, and it is somewhat unhappily similar to the spirit which nearly cost the lives of the whole crew of the *Niobe*.[1]

On the other hand, it is perfectly fair to hold that a Dominion which gives generously is entitled to some

[1] Cf. the view of Sir J. Ward, *Round Table*, 1915, p. 501.

degree of control in the action of what it gives.[1] But this action is essentially subject to the control of the Admiralty, and the Admiralty is nothing save the tool of the Imperial Government of the day, so that the position reduces itself to the great problem, in what way the Dominions can obtain a share in the direction of the foreign policy of the Empire. It is hardly, it is probable, realized by those who advocate the establishment of separate navies that this arrangement diminishes, and does not strengthen, the demand for a share in the knowledge of Imperial policy. If the position is that a Dominion fleet must be obtained as a loan after the outbreak of war, on condition that the Imperial Government can satisfy the Government of a Dominion that the war is necessary and just, and that naval policy which prompts the proposed loan of the ship is prudent, it will be inevitable that the Admiralty will make its plans irrespective of the Dominion fleet, and that the Imperial Government will in a corresponding degree be unwilling to trouble to share with the Dominion the knowledge of its foreign policy before the event happens which causes the need of the Dominion fleet to arise. It will be obvious that, confronted with war, it will be very difficult for a Dominion to refuse to give the use of its fleet, and that therefore its power of control of Imperial policy will tend to be less than ever. On the other hand, if in some way by a direct contribution of ships, some share of control may be won, the gain will be much greater than could otherwise be attained.

3. War and Peace

It is perfectly clear that in international law[2] the whole of the Empire is at war if the United Kingdom is at war, and that it lies in the hands alone of the Imperial Government to declare war and to make peace. A Dominion Government might attack another power, and the other power might carry on war in consequence, but the beginning of the war

[1] Sir R. Borden's view, *Round Table*, 1915, p. 427.

[2] Sir W. Laurier, *House of Commons Debates*, 1910, pp. 2964, 2965; Mr. Borden, p. 2982.

would be attributable to the Imperial Government only if that Government should not disavow the action of the Dominion and take steps to offer reparation. Nor is there the slightest reason to believe that this position is not understood in the most full manner possible by the statesmen in every responsible-governed Dominion. It would be impossible to find the evidence of a single remark to this effect made by any one of these statesmen, and the views to this effect attributed to them from time to time are based on misunderstandings of their language. At a very famous stage of the history of Victoria, when anything savouring of Imperial control was, under the influence of Sir Gavan Duffy, bitterly objected to, a Committee appointed by the Governor on the advice of his Ministry to consider Federal Union did definitely suggest that the status of neutral states should be sought by the British Government for the sake of the colonies, which should at the same time be given the treaty power, and thus be made into fully independent Governments, united merely through the personality of the ruler of all. The proposal went on to make the extremely naïve suggestion that the growing tendency of the maxims of international law to greater humanity would assist the British Government in securing this aim, while at the same time the position of neutrality would not prevent the colonies from coming to the help of the mother country in an emergency, but would merely add to the effect of their intervention in her favour as independent powers, a conception of neutrality of undoubted originality. The views of the small knot of statesmen who produced this report had no effect in the colonies of Australia, and the proposal for the conversion of the status of these colonies was never renewed by any responsible statesman. Based on similar ignorance of international law was the suggestion made by part, not the whole, of the Dutch press in South Africa in 1911, that it was possible for the Union to remain neutral during a war in which the Imperial power was engaged, a view which was contradicted effectively by the Union Government at the time when it was put forward.

But it is another question entirely to what extent the Dominions are obliged actively to assist the Imperial Government and the people of the United Kingdom when the latter begins a war, or when it is attacked. In the latter case it would seem doubtful whether any Dominion would or could stand aloof: it is improbable that it would not be felt to be too dangerous to remain indifferent to an onslaught upon the centre of the Empire. But the case has not yet arisen in any form calling for action by the Dominions, and the question of more importance is to what extent the self-governing Dominions are under obligation to take part in the wars of Britain generally. The answer to this question is perfectly simple: the Imperial Government and Parliament have never claimed that the Dominions must afford any active aid in men, money, or ships, in the case of a war waged by the United Kingdom, while, on the contrary, they have repeatedly acknowledged their obligation to the best of their ability to defend the whole of the Dominions of the Crown. There can be few more striking examples of this fact than the procedure followed in the Boer War and the European War, when it was desired to remove the British Imperial forces from Canada and South Africa respectively: no step was taken without the full concurrence of the Governments of the Dominion and the Union in each case. The basis of this attitude is presumably to be sought in the fact that the Dominions have no share in the election of the Parliament, and thus the appointment of the Government by which are determined the questions that lead to peace or war, and, having no share, they cannot be held to be bound to undertake actively burdens which may have been brought about by the errors of others, and which in any case expose them to grave dangers, or at best serious inconveniences through commercial difficulties. Similarly the obligation to give aid in wars brought about by Imperial policy follows from the fact that the Dominions had no part in the shaping of Imperial policy, and that the Imperial Government must make good the results of their errors.

It follows, of course, that if the war were brought about

by a cause which was not due to Imperial policy, but to the action of a Dominion, that Dominion would be expected to share in the burden of the war which it brought about, but though on several occasions in the history of Canada since responsible government this result has seemed near at hand, owing to the question of the fisheries and the American seizures in the Behring Sea, nevertheless, that calamity has been avoided, in no small measure thanks to the intervention of the cool judgement of the Imperial Government. It is easy for Canadian patriots to attack the policy of the British Government, and to deny that the British protection has ever been of any value,[1] but no sane man will deny that but for the British protection the Dominion of Canada would now have been a part of the United States. Such destiny, doubtless, is one which cannot be deemed in any way degrading, but the British power has preserved for Canada a still greater future as British North America, and it lies with Canada herself to make worthy use of the splendid opportunity afforded her to achieve greatness, without at the same time falling into so many grave errors as have the States in the manner of their social and economic development. On the other hand, if a Dominion is attacked, it must be expected to defend itself, though even in that case there is no record of any compulsion to this end imposed by the Imperial Government. In the crisis of the war in South Africa, while the Imperial Government made every use of the colonial forces which offered themselves, and while they could not, of course, consider as possible the idea of the neutrality of the Cape in the war which was put forward by Mr. Schreiner's Government, they did not compel the Cape forces to serve, nor did they supersede by Crown Government the responsible Ministry at the Cape,[2] or still less at Natal, which indeed hampered the effective conduct of the war by the stress which the Ministry laid on the effort to protect untenable positions for reasons other than strategic.

[1] e. g. J. S. Ewart, *Kingdom Papers*, ii. 59 146. No one knows better than Mr. Ewart that his case is purely *ex parte*.

[2] *Parl. Pap.*, Cd. 1162; cf. Lucas, *South Africa*, ii. 155 seq.

The most consistent exponent of the freedom of Canada to decide whether to take part in an Imperial war or not has always been Sir Wilfrid Laurier. In the case of the Boer War he was disinclined to take any steps to afford official aid from the Dominion to the mother country, doubtless in the main because he feared the effect of such participation upon the minds of that most suspicious of races and in some ways least warlike of men, the French Canadians of his native province, who throughout his career have been his main support in Government. Fortunately the Opposition, under Sir Charles Tupper's patriotic lead,[1] gave him the desired assurances of support, the stanchly British element in his Cabinet rallied to the support of the British cause, and enabled their chief to throw aside his fears of the result of the crisis to his party and to send to the United Kingdom the aid which it valued. The Conservative Party had already had the credit of such an action, for in the Egyptian campaigns in the hope of finding or avenging Gordon Canadian voyageurs had served with distinction and credit. In the case of the Boer War the amount of aid sent was quite considerable, and the Canadian arms won distinction at Paardeberg, but the amenity of the situations was somewhat marred by a vehement quarrel between Colonel Sam Hughes, the Minister of Militia, and the General Officer commanding in South Africa.

A formal expression of Sir Wilfrid Laurier's views was made at the Imperial Conference of 1911,[2] in regard to the proposal to enable the Dominions to see the text of proposed Hague Conventions when they were negotiated in a preliminary manner. He was not enthusiastic regarding the arrangement, and made it clear that his difficulty arose from the fact that, if the Dominions tendered advice to the Imperial Government, they ought to be ready to fight to make good the advice if need be, and Canada had not by any means come to the conclusion that she would take part in all the wars of the United Kingdom. Or, as he said in

[1] *Recollections of Sixty Years*, p. 311.

[2] *Parl. Pap.*, Cd. 5745, p. 117; cf. Gen. Botha, pp. 131, 132.

1910[1] in the Canadian Hou Commons: 'If England is at war, we are at war and ble to attack. I do not say that we shall always be attacked, neither do I say that we would take part in all the wars gland. That is a matter that must be determined mstances, upon which the Canadian Parliame to pronounce and will have to decide in its o dgement.'[2] Or again: 'Does it follow because osed to attack that we are going to take part in th rs of the Empire? No. We shall take part if we er: we shall certainly take part if our territory i

In the case of Sir Robe found the other side of the attitude of Sir W trid ' ', 'If Canada', he says, 'and any other Dominions o mpire are to take their part as nations of th Empire in the defence of the Empire as a whole, shall it be that we, contributing to that defence of the whole Empire, shall have absolutely, as citizens of this country, no voice whatever in the Councils of the Empire touching the issues of peace and war throughout the Empire? I do not think that such would be a tolerable condition. I do not think the people of Canada would for one moment submit to such a condition.'[3] The same view has also been expressed by Mr. Doherty, now Canadian Minister of Justice; speaking in the House of Commons on February 24, 1910, he said: 'What I desire to point out is that under our constitution there is no obligation on the part of Canada legally or constitutionally speaking to contribute to the naval forces of the Empire, and that position will continue to exist so long as the United Kingdom alone has exclusive control of the foreign affairs of the Empire.' The positive side of the line of argument was set out by Sir R. Borden on December 5, 1912, in moving for leave to introduce the Naval Aid Bill, when he said: 'When

[1] *Debates*, 1910, p. 2965.

[2] He most eloquently justified the participation of the Dominion in the war of 1914 as a matter of duty and righteousness; see *Round Table*, 1915, pp. 430–2; and cf. Canada *Commons Debates*, 1909, pp. 3511, 3512.

[3] Cf. Mr. Doherty's views, *House of Commons*, 1910, pp. 4137–44.

Great Britain no longer assumes sole responsibility for defence upon the high seas, she can no longer undertake to assume sole responsibility for or sole control of foreign policy, which is closely, vitally, constantly, associated with defence in which the Dominions participate. It has been declared in the past and even during recent years that responsibility for foreign affairs could not be shared by Great Britain with the Dominions. In my humble opinion adherence to such a position could have but one and that a most disastrous result. During my recent visit to the British Islands I ventured on many public occasions to propound the principle that the great Dominions, sharing the defence of the Empire upon the high seas, must necessarily be entitled to share also responsibility for and in the control of foreign policy. No declaration that I made was greeted more heartily and enthusiastically than this. It is satisfactory to know that to-day not only His Majesty's ministers, but also the leaders of the opposite political party in Great Britain, have explicitly accepted this principle and have affirmed that the conviction that the means by which it can be constitutionally accomplished must be sought, discovered, and utilized without delay.' He proceeded in the course of his speech to explain the constitution of the Imperial Defence Committee, its familiarity with foreign politics, the offer of the Imperial Government to summon to it regularly a minister sent by Canada, and the offer to give such a minister full information on foreign politics, and urged that such an arrangement, though only provisional, would be of great advantage to the Dominion. Effect was later given to the proposal, as described in the Secretary of State's dispatch of December 10, 1912, by the appointment of Sir George Perley, an honorary minister in the Canadian Cabinet, to act as High Commissioner in London the office having been vacated by the death of Lord Strathcona, and to represent Canada. The appointment was an unprecedented one, and its existence proved of service in accelerating the co-operation of Canada and the United Kingdom, which marked the opening of the war.

The Australasian Dominions have never been under the guidance in recent years of statesmen who asserted so firmly the doctrine of the facultative grant of aid to the Empire as Sir Wilfrid Laurier. The response made at the time of the Boer War was hearty in the extreme, though the perfection of accord between the two Governments was marred at the close by some minor incidents which need not be examined in detail. But the Labour Party, which as recently as the general election of 1914 was attacked by very ill-advised members of the Opposition as anti-British, has shown a singular eagerness to secure the due organization of the people for naval and military warfare. Mr. Hughes, now Prime Minister, and formerly Attorney-General, who, with Mr. Fisher, has been the leading spirit in the Labour Governments, since Mr. Watson abandoned the joys of leadership of the party for the more effective if less showy occupation of managing the party from behind the scenes, was one of the protagonists of universal training, and though it was not the lot of the Labour Government to introduce the principle into practice, still it has shown throughout great friendship for the proposal, and its Minister of Defence, Mr. Pearce, has been honourably noted for success in working the details. The attitude of Mr. Fisher has been throughout the same: the assistance of the Dominions means that they should have every possible opportunity for obtaining foreign information and understanding of the issues of foreign politics. New Zealand, with its constant loyalty and eagerness for the Imperial connexion, has of late very clearly adopted the same attitude: the sharing of the responsibility as well as the burden of defence is eagerly sought by some at least of the ministers of the Coalition Government by which the destinies of the Dominion are now controlled.

In all these Dominions the outbreak of the war of 1914 found the most eager response to the need of the moment. The Imperial Government had barely had time to warn the Governments of the critical state of affairs before the war became inevitable, but even the few days of suspense marked the arrival of most welcome assurances of support from the

Dominions. When war became inevitable, the action taken was decisive; Canada offered a Division, which, by the time it was ready, amounted to over 33,100 men, including a regiment mainly of ex-regulars recruited in the Dominion, commanded by the Governor-General's Secretary, Lieut.-Colonel Farquhar, which was to win the highest distinction in battle, and to suffer the most grave losses, including its leader. The *Niobe* and *Rainbow*, poor substitutes for the great addition to the Imperial power offered by Sir R. Borden, were transferred to the control of the Admiralty and engaged in useful work. A garrison was supplied for Bermuda, enabling the British force to leave at a time when every really trained man was invaluable. Moreover, assurances were given that while some 8,000 men would be kept on garrison duty in Canada, 30,000 men would be kept in training, so as to allow of successive reinforcements of 10,000 at a time being sent to the United Kingdom.[1] Australia at once promised to send a Division and a light horse brigade, and shortly added an offer, which was gratefully accepted, of an infantry brigade and a light horse brigade, and undertook to dispatch further reinforcements from time to time: by November 1915 92,000 had thus been sent; strong opinions have also been expressed in the Commonwealth in favour even of compulsory service for the sake of the war, though the troops raised as volunteers have been easily secured. New Zealand offered at once a body of over 8,000 men and constant reinforcements. These troops—amounting to 25,000 by November 1915—with the Australians were, in view of the need of protection against Turkey, landed and trained in Egypt, whence they were taken to win fame and, in too many cases, death in the Dardanelles. But in addition the naval forces of both Dominions were at once placed at the disposal of the Crown, and served in the reduction of Samoa and of German New Guinea with all the other German islands.[2] Newfoundland not merely contributed her naval reserve, but raised an excellent body of volunteers as soldiers.

[1] In December 1915 it was decided to raise 500,000 men.

[2] Japan took and transferred to Australia the Marshall Islands.

The position of the Union of South Africa was more difficult. The Government agreed readily to the withdrawal of the Imperial forces, and these trained troops were of great value to the Empire. But they were also invited to undertake the responsibility of capturing the wireless telegraph apparatus in German South-West Africa,[1] which was being used to give information to the German cruisers in the Pacific and was even suspected to be communicating direct with Berlin. The Union Government honourably undertook the duty, and Parliament, though with hesitation in some quarters, accepted the policy. This acceptance was unexpected by the group of malcontents who were looking for an opportunity to overthrow the Botha Administration, and in a brief period the forces which had been gathered for the attack in part turned traitor under the leadership of Maritz: rebellion broke out in the Orange Free State and part of the Transvaal, headed by de Wet and other leaders: the ex-Commandant-General of the Forces, who had taken part in the opening of the campaign and had been given full confidence, turned traitor, and neither Mr. Steyn nor Mr. Hertzog were willing to lay aside their personal feelings to do South Africa the benefit of saving her from rebellion. The German forces in the Protectorate were, however, slow in action and their strategy was ineffective: they failed to establish any real communication with the rebel forces, while on the other hand, after parleying long with the rebels and exhibiting the utmost forbearance, General Botha determined to strike, and in a short time crushed the movement. De Wet was captured when seeking to flee to the Germans, Beyers perished in seeking to cross a swollen river in flight, and almost all those who had served with Maritz surrendered when they realized that the rebellion had been a fiasco. The campaign against German South-West Africa was then resumed and carried out with skill and determination against an enemy who, for some reason, failed to exhibit that desperation in resistance which might have been expected.

[1] *Parl. Pap.*, Cd. 7873.

The rebellion,[1] however, had revealed, the more closely it was examined, the existence of a long conspiracy to overthrow the British power, a conspiracy in which the aged de la Rey had been engaged through his belief in the vaticinations of a prophet, van Rensburg, who failed to foresee, it seems, his own fate. Fortunately, as it proved, for de la Rey, an accidental shot, fired at the motor-car in which he was riding with Beyers, ended his life before he was able to carry out his intended treason, and the accident—the sentry was on guard for a motor containing some bandits who had committed murders, and fired at the car because it would not stop—served in some degree to throw out the plans of the conspirators. The action of the Government in view of the coming general election and the need of harmony in the land was extremely mild: there was constituted a special court to try offences, but the power to inflict the death penalty was taken away, and the ordinary rank and file of the rebels were accorded pardons, or were merely detained until the end of the campaign in German South-West Africa.[2] The bulk of the troops used to put down the rebellion were Boers, as it was felt that it would be both more just and more politic thus to use them against their countrymen, but the British element supplied the greater number of men for the conquest of German South-West Africa.

The best case that could be made out for the rebels by those who shared their views, but were afraid to put them into practice, was that the expedition to German South-West Africa was uncalled for, and that it was endangering the position of South Africa in the case of a British failure in Europe. In point of fact, it turned out that there had been for some considerable time a definite propaganda amongst the Boers of certain classes to start rebellion in order to recover their independence as soon as a favourable opportunity presented itself. The Government of German South-West Africa had been consulted and had received the approval of the Emperor for the proposal to approve the

[1] See *Round Table*, 1914–15, pp. 224 seq., 463–86, 875–80; *Parl. Pap.*, Cd. 7874.

[2] Even de Wet was released after payment of a fine.

plan, the Germans guaranteeing the position of the Boers. A significant commentary on the meaning of the guarantee was given by a map found by the Union forces in the course of their victorious progress, which was drawn by a German to illustrate the conception of the state of South Africa to be attained at the end of the war under the terms of peace: the Union of South Africa had disappeared, and there was only to be seen a piece of country marked 'Boer reserve', in the same way as here and there throughout the Union reserves are marked out for the native races. This was a somewhat crude but very expressive symbol of the fate which would have awaited South Africa, had the British power been overthrown. The risk of intervening on the British side was of course that the British might be overthrown and the Union be then at the mercy of Germany, but the fate of the Union if Britain were overthrown without her help being afforded to her was equally certain. The German Emperor was not so foolish as voluntarily to leave in the hands of a weak republic the best part of the whole of South Africa and the finest ports. The criminality of the rebels appears the more clearly in that it was certain that, if they were able to win some considerable success, the whole of South Africa would have been plunged into fratricidal war, and that troops from India must have been imported to maintain the British control, pending the full possibility of reconquest. Unhappily the crime of rebellion in South Africa is regarded as venial, and the only satisfactory episode in the whole affair was the evidence afforded of the determination of the Government of General Botha to uphold the sovereignty of the King, and the magnanimity of the British population, who not merely spared no effort to assist in restoring order, but acquiesced in the decision of the Government, for political reasons, to inflict no more than nominal punishment on rebels who had conspired with Germany to overthrow the sovereignty to which many of them, like de Wet, Maritz, and Beyers, had sworn allegiance. Indeed, perhaps the most deplorable feature of the rebellion is the fundamental dishonesty of temperament among many

of the Dutch population which it has revealed, and which augurs badly for the future of the country.[1]

The rebellion, too, suggests another problem of great difficulty. It is impossible not to raise the question whether the case may not arise that a majority in the Parliament and the white population of the Union might not desire to set up an independent régime, throwing off their allegiance to the British Crown. If this were the attitude of any other Dominion, the case would be simple: the desire must be conceded on terms to be amicably arranged. But in the case of the Union the Imperial Government has clearly a serious duty to the native population, which is not represented in the legislature, and to the British section of the population, who, for the most part, would certainly desire to retain the British sovereignty. Nor, it may be feared, would it be of much use to attempt to grant independence on the condition of any privileges to be retained for natives or British subjects, for the enforcement of such rights would either be impossible or lead to war. It would therefore very possibly be impracticable to allow the country to be independent, and this fact must probably govern the situation in the Union for many years to come. Moreover, the attitude of the Union renders it doubtful whether in the interests of Rhodesia entrance into closer relations with that country should not be delayed for a considerable period: possible acquisitions of other outlets may enable Rhodesia to remain outside the orbit of the Union altogether, or at least until time has succeeded in building up there an effective spirit of unity in allegiance to the sovereignty of the Crown.

Unlike the Boer War, where the enemy were confined to a single portion of the world, and where any aggressive action outside South Africa was not to be seriously expected, in this war the wide effect of the outbreak of hostilities was evidenced everywhere by special legislation to meet the needs of the case. It is important to note that this

[1] The general election of October 1915 gave Gen. Botha 54 votes, the Unionists 40, Independents 5, Labour 4, and Nationalists 27, a serious sign of the feeling of the Dutch districts.

legislation was not Imperial, but Dominion, and State or provincial: the existence of a condition of war brought with it, of course, the result that the enemy became in the position of alien enemies, but it did not in any way abrogate the doctrine that the passing of any legislation arising out of the state of war was a matter solely for the consideration of the Dominion Governments and Parliaments. Even in minor details care was taken to secure that the position and autonomy of the Dominions should not be affected injuriously by the war. The mere outbreak of war made it an offence to trade with the enemy, unless with the royal permission. The prerogative of the Crown to grant such permission and thereby to relieve the actor of responsibility for breach of law is naturally not delegated in time of peace to the Governors of Dominions. The first proclamations regarding trading with the enemy, in which matters affecting the Dominions were dealt with, were widely worded, and no special rule laid down for the case of the grant of permission to trade in the Dominions, but the omission was remedied by a Proclamation of October 8, 1914, in which, in the operation of the provisions of the Trading Proclamation, for Orders in Council made and published on the recommendation of a Secretary of State was substituted, as regards persons resident or carrying on business in the Oversea Dominions, an Order of the Governor in Council published in the official gazette, and the power to grant licences to perform certain acts which would otherwise have been illegal was conferred on the Governors-General[1] of the Commonwealth, the Union, and Canada, and on the Governors of New Zealand and Newfoundland. The same power was also given to the Governors of the colonies not possessing responsible government, but in their case the grant was for reasons of convenience, not for constitutional grounds.

The grant of extra powers taken by the Dominion governments was generally wide. Thus in Canada one Act (c. 2)

[1] This was, no doubt, correct; though internal trade is a State matter, licences would nearly always involve external trade, a Commonwealth matter under s. 51 (i) of the Constitution.

ratified all the actions done on or after August 1, 1914, by or under the authority of or ratified by the King-in-Council, any minister or officer of the Imperial Government, the Governor-in-Council, any minister or officer of the Canadian Government, and any other authority or person which would have been authorized by the Act or by orders or regulations under it had they been done after the passing of the Act. It was provided that the issue of a proclamation by His Majesty or under the authority of the Governor-in-Council should be conclusive evidence of the existence of war and of its continuance, and it was declared that war had existed since August 4, 1914. The Governor-in-Council was given general power to do and authorize such acts and things, and to make from time to time such orders and regulations as he might by reason of the existence of war, invasion, or insurrection deem necessary or advisable for the security, defence, peace, order, or welfare of Canada, including censorship, arrest, detention, exclusion, and deportation, control of harbours, ports, and territorial waters of Canada and the movements of vessels, transportation by land, air, or water, trading, exportation, importation, production and manufacture, appropriation and control, forfeiture and disposure of property, and of the use thereof. In any case where property or its use was appropriated by the Crown, and compensation was to be made therefor, in default of agreement it was to be decided by a judge of the Supreme Court of Canada, or a superior court or county court of the province in which the claim arose. Penalties for violations of orders and regulations made under the Act could be imposed, but not to exceed a fine of 5,000 dollars, or imprisonment not exceeding five years, or both fine and imprisonment. No person held for deportation under the Act or any regulations, or who was under arrest or detention as an alien enemy or upon suspicion of being such an enemy, or for preventing his departure from Canada should be released on bail or otherwise discharged without the consent of the Minister of Justice. The Immigration Act was amended by providing that no resident of Canada, whether

or not he was a Canadian citizen or had Canadian domicile or not, who left Canada to perform any military or other service for a country then at war with His Majesty, or for the purpose of aiding and abetting His Majesty's enemies, should be permitted to land in Canada or to remain therein except with the permission of the minister. Other Acts passed at the same session, summoned immediately on the outbreak of war, dealt with the conservation of the commercial and industrial interests of the Dominion, authorized the modification of the rules regarding the issue of Dominion notes, changed the customs-tariff in order to raise a larger revenue from imports of certain articles of food and drink, and incorporated the Patriotic Fund of Canada to deal with cases of need. Another Act appropriated the sum of fifty million dollars from the consolidated revenue fund towards defraying any expenses to be incurred by or under the authority of the Governor-in-Council during the year ending March 31, 1915, for the defence and security of Canada, the conduct of naval and military operations in or beyond Canada, promoting the continuance of trade, industry, and business communication, whether by means of insurance or indemnity against war risks or otherwise, and the carrying out of any other measure deemed necessary or advisable by the Governor-in-Council in consequence of the existence of a state of war. The Governor-in-Council was also authorized to raise money by loan for making payments covered by the authority of the Act.

Equally effective steps were taken by the Governments of the Commonwealth and the States in Australia and by the Government of New Zealand.[1] Much of the legislation was devoted to securing the full control of the food supply so as to prevent the holding up of stocks and the making thereby of undue profits at the expense of the public, while steps were also taken to secure that the export from Australia

[1] See account in *Round Table*, 1915, pp. 201 seq.; 1914-15, pp. 240 seq. The generosity of the Imperial Government in providing large loans for the Dominions and in taking up foreign bills held by Dominion banks greatly aided the Dominions.

of any articles of food which were in demand was prevented. The State of Queensland, acting with foresight and effectiveness, passed an Act providing for the acquisition of the whole of the meat produced in the State with the view to its sale to the British Government, a step which aided considerably the victualling of the armies of England and France and in keeping within fairly reasonable limits the rise in the cost of commodities. In the case of New South Wales an Act was passed authorizing the acquisition by the Government of the wheat supply, the Government intending to secure that there should be no shortage in the State. This decision of the Government had the result of disappointing and causing loss to certain speculators and dealers in Victoria who had relied on obtaining supplies from New South Wales, and the result was that the matter was brought before the Interstate Commission established by the *Interstate Commission Act*, 1912, in order to obtain a declaration that the Act was *ultra vires* the Parliament of New South Wales, as it constituted an interference with freedom of intercourse among the states provided by s. 92 of the Constitution of the Commonwealth. The Interstate Commission, on the hearing of the case, stated a special case for the consideration of the High Court as to the extent of its jurisdiction to deal with the matter, and at the hearing of the case, on the suggestion of the Chief Justice, the Commonwealth of Australia brought an action against the State for a declaration of the invalidity of the Act, so that, even if the Interstate Commission had no jurisdiction, the question at issue should be disposed of.

On March 23, 1915,[1] the decision of the High Court was delivered, in which they unanimously held that the Act of New South Wales was *intra vires*. It was contended for the Commonwealth that the law must be invalid because it interfered with the right of persons who in New South Wales had contracted to sell their wheat to persons in another state to carry out the contract, and that thus the prohibition of the Constitution against the existence of any hindrance

[1] Melbourne *Argus*, March 24, 1915.

to free trade was evaded. The Chief Justice pointed out that if the contention of the Commonwealth were to be supported to its full extent, it would amount to a claim that in any Act for the regulation of the expropriation of private property there must be an exception for any case in which the property was an object of state commerce at the time of expropriation. If this were the case, still the law could clearly stand as to other property, the rule being that a law must be read as dealing with the subject-matter which it could control, and therefore the Act could not be *ultra vires* on this ground. But he pointed out that the effect of the Act was not to limit the powers of an owner to export his goods to another state, which the constitution forbade, but the effecting of a change of ownership of the goods. The state became the owner of all the wheat in the state, the owner having merely a compensation claim, and the new owner was free to export as he liked. The result was that the Act could not be said to violate s. 92 of the constitution, even if it were notorious that the Government of New South Wales acquired the wheat to prevent export. Moreover he held that the Interstate Commission had no authority in the matter, as it had no judicial power proper. The Commission was created under the power given by s. 101 of the constitution to set up a body provided with such powers of adjudication and administration as Parliament should deem necessary for the execution and maintenance within the Commonwealth of the provisions of the constitution relating to trade and commerce and the laws made thereunder. In exercising this power in the Act of 1912 Parliament conferred express judicial authority on the Commission and made it a court of record and invested it with the powers and privileges of the High Court of the Commonwealth itself. In support of this action of Parliament it was argued that the constitution in s. 73 spoke of an appeal on points of law lying from the decisions of the Commission, and that this showed that it was to be a real judicial body. The Chief Justice overruled this argument, on the ground that it clearly was provided by s. 71 of the

Constitution that judicial power was to be exercised in the Commonwealth by the courts therein expressly provided for, and that mode of appointment of the Commission and their tenure of office was specially provided for in the constitution, showing that they did not fall under the same principles as justices of the Commonwealth. The right of appeal was given because in the operation of their functions the Commission must decide mixed questions of law and fact, and it was felt right that they should be subject in matters of law to the control of the High Court. The power of adjudication as given was one of a different kind, analogous to the power given in England to bodies like the Board of Trade or Local Government Board or other bodies, as in the case of the Imperial Act, 9 Edw. VII, c. 44, regarding housing, town planning, &c. It was never used in British statutes for the purpose of conferring jurisdiction proper, and it could not in the case of the Commonwealth be given that sense in the face of the plain distinction between judicial and other powers. The view of the Chief Justice was shared by Isaacs J., who compared the functions of the Commission as quasi-judicial with those of customs officials or the commissioner of patents, and by Powers and Rich JJ. On the other hand, Barton J. held that the powers of adjudication were equivalent to judicial power, and this view was shared by Duffy J., but both agreed that the New South Wales Act was valid, though Barton J. only on the ground that it was valid in so far as it does not interfere with s. 92 of the constitution.

A further case of interest arose from the operation of the *War Precautions Act* of the Commonwealth. By s. 4 of that Act power was given to the Governor-General to make regulations for securing the public safety and the defence of the Commonwealth. Under this Act a regulation was made authorizing the Minister of Defence, when he had reason to believe that a naturalized person was disloyal or disaffected, to order him by warrant to be detained in military custody until the end of the war. By virtue of a warrant under the hand of the minister one Franz Wallach,

manager of the Australian Metal Company, was detained at a military camp at Langwarrin, and obtained a writ of *habeas corpus* on which he was brought before the full court of Victoria on August 2, 1915.[1] The Minister of Defence attended the court and gave evidence on oath that he had reason to believe that the prisoner was a person who should in the interests of the Commonwealth be interned, but he declined to explain the nature of his information on the ground that it would be prejudicial to the interest of the Commonwealth to do so, and in this contention he was upheld against the Chief Justice by the other two judges. On the main question whether the regulation in itself was reasonable the court was divided in opinion, but the Chief Justice and a'Beckett J. held that it was not. The power to suspend the *habeas corpus* Act rested with Parliament, and it was clearly possible for Parliament to authorize the step taken if it thought fit, but the regulation in question was made under no express power to deny a British subject the ordinary right of liberty, and it was therefore, as it gave no ground for the court examining the cause of the detention, too wide and could not be held to be *intra vires*. A'Beckett J. concurred in this view: under the regulation far too wide a power was given to arrest and detain without examination, and though the power was given to the minister it was equally open in law for the power to have been given to any person if the regulation was *intra vires* under the Act. Cussen J., on the other hand, held that in war time and under an Act dealing with war precautions the regulation could be upheld. As a result the prisoner was discharged, only at once to be rearrested on the strength of a new regulation under the Act, providing that if in view of the hostile associations of any persons it is in the interest of public safety and the defence of the Commonwealth that he should be detained in military custody, the minister may order his detention, and the decision was reversed on appeal.[2]

In the case of the Union a *Public Welfare and Moratorium Act*, No. I of 1914, conferred on the Governor power to fix

[1] Melbourne *Argus*, August 3 and 10, 1915. [2] 21 A.L.R. 353.

prices for commodities, to ascertain the amounts of commodities stored, to appropriate commodities for the public use, if unreasonably withheld, on payment of compensation, to take possession of premises for the storage of goods, to prohibit the publication of false news, and of information regarding defence matters. He was also authorized to proclaim under certain conditions a moratorium, and further Acts conferred various financial and other powers, besides authorizing the construction of a railway to facilitate the attack on German South-West Africa. The presence of German subjects in the Cape raised at once the same difficulties as in the United Kingdom. In *ex parte Belli*[1] a German resident at Capetown asked the Cape Provincial Division to declare illegal his arrest by the authority of the Union Government and his removal by the same authority to confinement at Johannesburg. The applicant was exempt from military service in Germany and not a reservist. He had, prior to his arrest, reported himself to the Capetown magistrate. The application was rejected by the court. While they recognized that there was modern authority for mild treatment of alien enemies, they could not deny the positive right of the Government to take the action in question, as it was within their legal right to detain as prisoners of war every subject of a hostile power found within their territory, and the court had no discretionary power to intervene. The same court in September 1914, in *ex parte Savage and others*,[2] decided the rights of alien enemies to sue and be sued in the Cape courts in the same sense as that of the decision of the English Court of Appeal.[3] It was laid down that the character of an alien enemy is determined by residence in a hostile country, and that in accordance with the rules of English common law this prescribes a prohibition of intercourse between such alien enemies and persons resident in the Cape, and the court held that, unless special legislation was passed in accordance

[1] [1910] C.P.D. 742.

[2] [1914] C.P.D. 827.

[3] *Porter* v. *Freudenberg*, *Kreglinger* v. *S. Samuel & Rosenfeld*, *in re Merten's Patents* [1915] 1 K.B. 857.

with the Hague Conference of 1907, forbidding interference with legal proceedings, the common law rule involved a prohibition for an alien enemy to use any South African court of justice. The same rule did not interfere with suing alien enemies in a civil action, as there was nothing against public policy in this, and it resulted that an alien enemy could be sued in the courts of the colony. It was also held that as the method of substituted service did not prevail in the courts of the Cape, and as edictal citation would be an imperfect means of giving notice, recourse could be had to the method of seizure of property *ad fundandam iurisdictionem* or simply to service of the summons on the local branch of the firm in question, whose head office was at Berlin but which had branches in the Cape.

It is quite inevitable that after being so deeply affected by the war as the Dominions have been, and after making such ready sacrifices for the cause of Empire, they should seek the assurance that they shall most fully be consulted with regard to the termination of hostilities. For a time a somewhat determined movement was made in favour of the holding in May or June 1915 of an Imperial Conference to discuss affairs,[1] but the proposition, though apparently seriously intended and supported by the wishes of the Commonwealth Government, could hardly be taken as practicable. The Canadian Government, by means of their minister stationed in London, had the fullest and most intimate relations with the Imperial Government, and a conference would have had no attractions for them in any way. The Prime Minister of the Union of South Africa was busy in devising an attack on the German forces in South Africa, and was also for the earlier part of the war deeply engaged in contending against a dangerous rebellion, and after its suppression was very busily involved in an election campaign. In the Dominion of New Zealand a curious political position arose in December 1914, for the opposition, as a result of the general election, found itself in

[1] See *The Times*, May 22, 1915; *Round Table*, 1915, pp. 325 seq. The latter is a reasoned statement of great interest.

almost an equality with the Government, the issue depending, as usual in such cases, on the decision of one or two doubtful seats. The position therefore left no possibility for the dispatch of a minister to the United Kingdom until, after a long series of tactics, it was agreed to found a coalition government and to send a united representation to any Imperial Conference held in the future, a decision the wisdom of which was obvious, since the two parties in the Legislature have clearly come to almost the same numbers and degree of popular favour. In the Commonwealth alone could ministers have been spared to visit the United Kingdom, and the holding of a Conference with these ministers was of course open had they cared to come, but naturally enough they preferred a full Conference. Accordingly the meeting of the Imperial Conference due for 1915 was postponed by agreement until a more convenient season, but a most clear intimation was given that the terms of peace as affecting the Dominions would be discussed with the Dominions before the peace was concluded.

In the military operations which were undertaken by the Dominions against the German Protectorates in Samoa, in New Guinea, and in South Africa the Governments concerned acted entirely on the understanding that any conquests which were made by their troops were made in the name of the Empire, and that the question of annexation or other action in regard to the conquests must wait until the conclusion of the war. The territory thus taken was therefore not annexed to the Crown, as often loosely stated: the territory was merely occupied, and is now being administered by the Dominion Governments on behalf of the Crown pending the final allocation in time of peace. The conventions which were made with the German forces occupying the islands were nothing but military conventions, though the fullest use of the freedom of a commander was made by General Botha in settling the terms on which German South-West Africa was to be yielded to the British arms. It is, however, very certain that neither New Zealand, nor the Commonwealth of Australia, nor the Union, will be

willing to relinquish the territory which they now hold. New Zealand bitterly resented in 1899 the conclusion of the Samoa Convention,[1] though that Convention was really forced from the Imperial Government by reason of the pressure exerted by the German Government at the moment when the British reverses in the Boer War had begun to look serious. At that psychological moment the pressure of public opinion in Germany, which had been fairly calm, became, in the view of the German Government, so serious that something had to be done to assuage it, and the action taken was in the form of asking for the cession of the British share of the islands. Luckily the British Government, by remaining firm, succeeded in obtaining the cession of all German claims on Tonga and the giving up of the Solomon Islands, but obvious considerations of this kind do not appeal very forcibly to persons not familiar with foreign politics, and at a great distance from Europe. The feeling, however, that Great Britain was negligent of the interests of New Zealand in that matter, though it cannot be too often said that it was perfectly unfounded and that British diplomacy in this affair showed itself at great advantage, is one which it is not to be expected that any considerations will eradicate, and the demand of New Zealand for that island will be firmly pressed at any conference or discussion. Similarly Australia remembers that Queensland tried in vain to annex what is now German New Guinea, and may be trusted to demand that the full possession of the territory will be secured to it, not indeed because of any intrinsic value, of which it probably has very little, to judge from the case of British New Guinea, which will not progress despite much effort and some money, but because it is most undesirable to have in foreign hands any part of an island which is really an integral part of the continent. In the case of South Africa General Botha has already declared that the German territory is required for the Union. It is said to have in it not merely great wealth in diamonds, which is admitted, but considerable ranges of land suitable for

[1] See *Parl. Pap.*, Cd. 7, 38, 39, 98.

settlement, and the great need of the Union Government is such land. Moreover, quite just emphasis has been laid by General Botha on the conduct of Germany in its treatment of the Hereros as a source of unrest and discontent among the native races of South Africa. Nor in fact can it be good for a country to have as next neighbour a country which exterminates a nation with as little humanity as shown by Germany to a helpless if not very attractive native race. Moreover, the actual presence on South African soil of a power which has intrigued against the Government of South Africa is really an intolerable grievance, which the Union cannot be expected to acquiesce in unless it is essential.

It is obvious that there is abundant room for difficulty in the granting of their desires to the Dominions unless the war has a perfectly favourable ending, and in that case there is the danger of the desire to mitigate the harshness of the terms given interfering with the demands of the Dominions. It is right to recognize the danger, for the absurd view has actually been expressed that, as a matter of goodwill, in the case of success in the war many colonies, including German South-West Africa, should be returned to Germany. If the Imperial Government has the power to retain German South-West Africa and does not do so, it will be clear that the sacrifice of the Dominions has been wasted and that the Empire is merely a name, but the contingency of any such folly on the part of the Imperial Government should not be accepted as a possibility. The more serious position may be that some sacrifices have to be made to ensure peace, and that the Dominions may be involved in the sacrifices. The mere possibility of this is adequate reason to render the prosecution of the war by the Government the more effective and resolute.

A mere consideration of the actual position of the war, the great efforts which must still be made before there can be any hope of peace, shows how idle were the proposals to have an early meeting of the Imperial Conference, based on the idea which the Dominions, not perhaps unnaturally,

entertained, since many people in the United Kingdom suffered from the same delusion, that there was a chance of an early peace. It is still premature to discuss the actual mode of arranging peace when no peace is in sight. It is, however, quite a different thing to discuss the steps which should be taken in settling the outlines of the conditions of peace to be sought, and that could be done by a conference if the time and circumstances of the Dominions permitted a full attendance of ministers. It may, however, be observed, that the appointment of the ex-Labour Prime Minister to be High Commissioner of the Commonwealth in London affords a simple and effective means, if desired, for keeping the Labour Government in touch with the Imperial Government and with foreign affairs. It is true that the High Commissioner remains a civil servant of a special kind, but that does not alter the fact that he must be in complete sympathy with the Labour Government of which he has so long been the leader in Parliament, and that owing to the caucus system he is not in the same position towards his ministerial superiors as the ordinary High Commissioner to the Government by which he is appointed. The Labour system of rule gives to the private individual a considerable amount of importance as compared with ministers, for it reduces their rank by subordinating their position to the control of the Labour Party in Parliament, and behind that the Labour Party in the country, and thus while the position is experimental it is not impossible that in this way the needs of consultation might be met effectively and conveniently. That if possible a full Conference should be held is obvious, but must depend on the wishes and needs of the Dominions as a whole. Australia and New Zealand have far more need for conferences than the nearer Dominions.

The position of the Dominions in any actual Peace Conference which might be held to settle terms of peace is a more difficult question. If a formal meeting similar to those which marked the end of the great wars of the beginning of the nineteenth century were held, it might be possible

to have the Dominions represented by advisers of the British plenipotentiaries, or as members of the British delegation acting on the rule that the final decision would rest with the Imperial Government. It might also be possible that they should act as plenipotentiaries to represent the King on behalf of the Dominions, as has been done in the case of two commercial conferences, and has been suggested above [1] as a suitable procedure for Hague Conferences. But it may be doubted if, in case of the peace necessary to effect a settlement after a war in which there are the wishes of so many allies to consider and so many conflicting aims to be reconciled, it would not be better to allow the Dominions merely to be represented in an advisory capacity.

It must of course be remembered that the common idea that in this war the Dominions are coming to aid the Empire merely out of chivalry and loyalty is not an accurate representation of facts. It is most true that this is the feeling animating many of those who have offered themselves for service, but it would be idle to deny that the war is essentially one as much for the freedom and the power of self-government of the Dominions as it is for the freedom of the United Kingdom. We may indeed go further and assert that the Dominions are in rather more danger, with the exception of Canada, which would be protected by the United States in accordance with the Canning doctrine [2] as enunciated by Monroe in her own vital interests,[3] than the United Kingdom herself, which is too strong to be finally ruled even by a victorious Germany. But Australia and New Zealand, and still more South Africa, would have no chance of resisting appropriation by a victorious Germany, and it is idle to deny that the obtaining of such possessions would exactly meet the German view of their future in the world. There has been evidence already in the Common-

[1] Part I, chap. xiv.

[2] See J. S. Ewart, *Kingdom Papers*, ii. 169-92, who usefully reminds his fellow Canadians of the true source of the policy.

[3] This would be humiliating to Canada, as pointed out by Sir W. Laurier; *Round Table*, 1915, p. 431, and by Sir R. Borden, ibid. p. 432.

wealth[1] of the insidious control which has been effected of the whole metal industry, a control which the Commonwealth Government has set itself successfully to defeat for good,[2] and the university circles of New Zealand have given a signal example of their lack of common-sense by their determined resistance to the wise decision of the Government and the Parliament that an unnaturalized German professor should not be allowed to continue the instruction of youth.

[1] Note should be made of the clear recognition of the *Bulletin* (e.g. Aug. 12, 1915) of the real stake of Australia in the war.

[2] See *Round Table*, 1915–16, pp. 175–80. The necessary co-operation of the Imperial Government is to be obtained by Mr. Hughes during his visit of March 1916 to London.

C. THE JUDICIAL POWER

CHAPTER XVI

APPEALS TO THE PRIVY COUNCIL

THERE still exists at the present day a very wide right of appeal to the Crown-in-Council from the courts of the oversea Dominions possessing responsible government, and it is perhaps not always realized that the right to appeal is not one which can be taken away at pleasure by the Legislatures of the Dominions. Apart altogether from the question of the exercise of the right of the Crown to withhold assent from a Bill fettering the right of the Judicial Committee of the Privy Council to grant leave to appeal from the decision of a Dominion court, in almost every case such an attempt at legislation would be *ultra vires*, and would therefore not in law hamper the exercise of the discretion of the Judicial Committee in performing their function of considering such appeals. Moreover it must always be borne in mind that the Judicial Committee is a judicial body, and that, though it is not impervious to considerations of a quasi-political nature as to the mode in which it should exercise its right to grant special leave to appeal, nevertheless it is bound to deal with any such application in a judicial spirit and to decide it in a judicial manner. It would not be possible to lay down for that body any rule that the dislike of a Dominion to the hearing of appeals should be a ground for not hearing those appeals which were actually brought to its notice.

The right of the Crown to grant special leave to appeal rests on the royal prerogative in the first instance, but the prerogative can be barred by local legislation in most cases, and it may be held that it could effectively be barred in the case of this prerogative also. There is, however, a certain

difficulty in the matter which cannot be wholly ignored. The prerogative is exercised in the United Kingdom, and not in the Dominion, and it may be argued that the effect of a local Act being limited in territorial effect would not bar the possibility of the grant by the Crown of special leave, and that, if on the hearing of the appeal the judgement were reversed, the effects of such a reversal would follow automatically in law, if not in practice. On the other hand the question is really academic, for, if the actual effects were not permitted to follow in the Dominion, if the courts there were instructed by local law that their decisions were to be treated by them as final, the reversal of a decision on appeal would matter nothing, and, what is more important, the Judicial Committee would not deal with judgements which would not be affected by their decisions. In any case, however, the power to prevent the operation of the prerogative is taken away from nearly all Dominion Legislatures by the provisions of an Act, 7 and 8 Vict. c. 69, which was passed, not for this purpose but merely because it had been found doubtful whether the Crown had power to hear cases brought on appeal, not from the last appellate jurisdiction in a colony, but from an inferior court. It may at first sight seem strange that there should have been any desire to hear appeals direct from the inferior courts, but the explanation is that in several colonies the final court of appeal in the colony itself was the Governor-in-Council, not a judicial body in any very satisfactory sense, and not one which was likely by its deliberations to add much of value to what was said in the highest inferior court. Indeed this anomalous system remained alive in theory in Western Australia until 1911,[1] when the last remnant of it was abolished as the result of the discovery that apparently the Governor-in-Council was a court of appeal in divorce cases, a duty which that body had not the slightest desire to perform. The Act, however, while permitting appeals to be brought direct from any inferior court, incidentally abolished all restrictions on the right to bring appeals

[1] Act No. 4 of 1911; *Parl. Pap.*, Cd. 6091, p. 53.

from the final court in any colony by including that court in its wording.

Curiously enough the effect of the Act in question was long overlooked: it is otherwise inexplicable that there should have arisen any dispute regarding the Act creating the Supreme Court of Canada, when the Imperial Government in 1875 clearly intimated that the Act must not touch the prerogative right to grant special leave to appeal, or it could not expect to obtain the royal approval. The same question arose further regarding the right of the Privy Council to grant special leave to appeal in the case of criminal cases in Canada. The matter was brought to a head by the discovery that the Privy Council in a suitable case would grant such leave as in the case of the trial of Louis Riel [1] for his part in the North-West rebellion of 1885. The Canadian Government decided that the prerogative must be barred, and after one failure secured the placing on the statute book of a law, which was held by them to have attained this end. The Act, however, is not a triumphant example of the barring of the prerogative, but a striking example of the fact that the Act of 1844 seems to have been as little read by the lawyers of the Crown in Canada as by those of the United Kingdom. In the case of New Zealand an Act dealing with divorce passed in the year 1912 sought to restrict the right of appeal to the Privy Council in a minor matter: the point at issue was infinitesimal, but it was at once recognized that the Act was *ultra vires* the Parliament of New Zealand and by Act No. 69 of 1913 the peccant paragraph was emended.[2]

It is not of course to be supposed that the Judicial Committee are indifferent to the views of the Dominion Governments in the matter of what appeals are proper. Of their own motion they have insisted on declining in normal circumstances to hear appeals in criminal cases and have refused to become a court of criminal review, though they have always held themselves at liberty in any very extraordinary case to grant leave to appeal. The trial of Riel

[1] *Riel* v. *Reg.*, 10 App. Cas. 675. [2] *Parl. Pap.*, Cd. 7507, p. 47.

was clearly such a case: not only was the matter one of the utmost political interest in the Dominion, where the people of Quebec were eager to save a man whom most of Canada regarded as no better than a murderer and who was in fact a good deal of a madman, but the questions raised as to his trial were serious questions of constitutional law, dealing with the problem how far it was possible for the Legislature to repeal the old statutes in force in the territory before it was placed under the legislative power of the Dominion of Canada. It is not likely that any such case will ever again arise in Canada, but, if it did arise, it is not certain that the Judicial Committee would feel bound to refuse to decide it: it is not even impossible that it might be desirable and desired that the Judicial Committee should so decide it, for Canada has very high respect for the advantages of a tribunal which is above any suspicion of being swayed by party politics in the Dominion. On the other hand, the Judicial Committee on May 7, 1914, declined to admit an appeal from the Supreme Court of Canada in *Carey* v. *Roots*, which was a case arising out of contract to purchase land: the matter was disputed and there was very considerable conflict in the courts below, the decision of the Supreme Court reversing a decision of the Supreme Court of Alberta in its appellate jurisdiction, a fact which was urged as a reason for having the matter finally disposed of by the highest tribunal. In this sort of case appeals have not rarely been allowed in the past, but the Lord Chancellor announced that in his view the practice of the court had been unduly lax, especially as the *Supreme Court Act* of the Dominion evidently deprecated any appeal at all being brought to the Privy Council. The view is one which is naturally felt strongly by the Supreme Court of the Dominion itself, and there is this amount of justification for the objection to the hearing of such appeals on other than constitutional questions, in that the plaintiff or defendant, as the case may be, who is defeated below can carry the case direct to the Privy Council from the appellate division of any province, so that if he chooses to go to the Supreme C[illegible]

he should accept the decision as final. In a case where the appeal to the Supreme Court is brought by the party who is victorious in that court the case for a decision by the Privy Council is stronger, as obviously the other party had no option of action accorded to him at all.

As in Canada, in the Commonwealth there is the same possibility of elaborate appeals arising from the fact that an appeal lies from every Supreme Court in a State to the Privy Council or alternatively to the Commonwealth High Court, and that from the latter an appeal lies by special leave to the Judicial Committee. The case of the Commonwealth is, however, differentiated greatly from that of Canada by the arrangement made to preserve for the Commonwealth the decision of the interpretation of its own Constitution, a decision based on the American models which it was the glory of the fathers of federation to follow with more affection than wisdom, as the stormy history of the interpretation of the Constitution has shown. The Constitution as finally accepted by the Imperial Government allowed the High Court of the Commonwealth to be the final judge in any case brought before it where the constitutional rights of the States *inter se* or of the Commonwealth and the States were concerned. It was recognized at the time that, as the State courts would deal with these questions in matters coming before them and as the appeal from the State courts still lay to the Privy Council, there might arise the possibility of the two tribunals giving different judgements on the same point, that of the High Court being final unless it should be pleased to grant permission to appeal from its own decision. But it was argued that as normally the Privy Council was the higher court, the High Court would bow to its views. The result proved the opposition to be quite unfounded. The High Court not merely held [1] that the salary of a federal officer could not be taxed by a state since that would allow a state by taxation to interfere with a Commonwealth instrumentality, which the courts of the United States held to be wrong, but when

[1] *Deakin* v. *Webb*, 1 C.L.R. 585; Keith, *Journ. Soc. Comp. Leg.* ix. 269–80.

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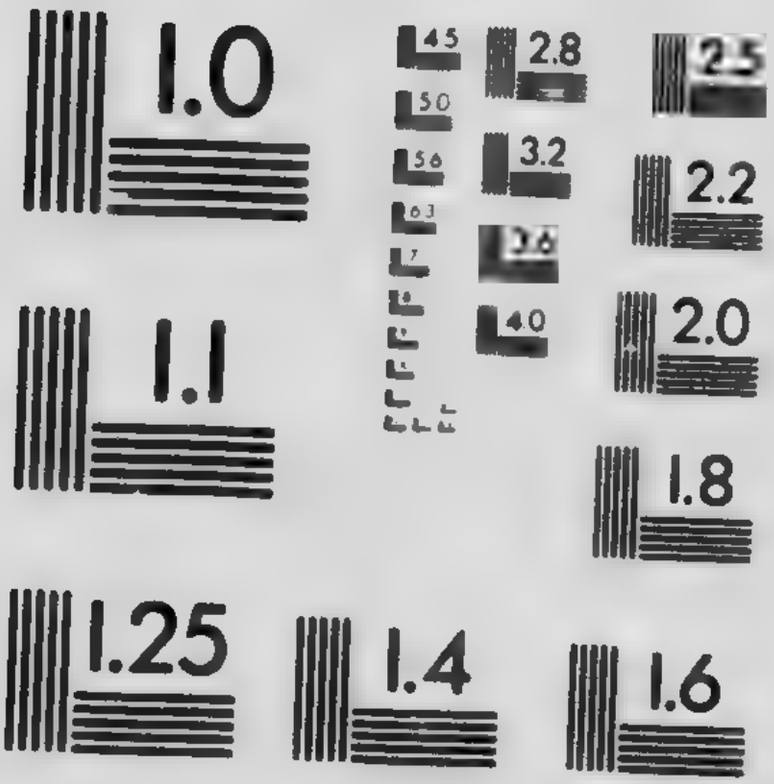

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the Privy Council [1] ruled in precisely the same issue brought on appeal from Victoria in precisely the opposite sense, they persisted in their view and declined either to accept the view of the Privy Council or to allow an appeal from their judgement to that body. The situation was ludicrous, and the knot had to be cut. The Parliament legislated [2] to allow the States to tax federal officers at a rate not exceeding that imposed on other inhabitants of the States, and it also [3] enacted that no constitutional case affecting the powers of the Commonwealth or the States *inter se* should be determined by a State supreme court, but must be removed to the High Court itself for determination. The Act was *intra vires* as the power had been given to the Parliament to deal with federal jurisdiction, and it effected its aim. The High Court proceeded to interpret the constitution of the Commonwealth with such effect that the most wholesale attempts at amendment have been made by the Labour Party to rescue the Commonwealth as they hold from the legalism which has deadened its life and is destroying it. On the other hand the High Court on the occasion when it has allowed the Privy Council to deal with its judgements has not fared altogether very satisfactorily at its hands, and the irony of fate is that while the High Court of the Commonwealth has on the whole distinguished itself by the upholding of the rights of the States and not of the Commonwealth—whereas the tendency of the Supreme Court of Canada has rather leaned to the other side, the Privy Council, with whose decision it quarrelled in the early history of the court on the ground that it was too favourable to the States, has gone in its latest judgement much further than the Commonwealth High Court, by holding that the *Royal Commissions Act*, 1912, of the Commonwealth, on which action against the Colonial Sugar Refining Company was based, was not merely not applicable in that special case, but was in itself *ultra vires* as containing matter which was quite beyond the authority of the Commonwealth.

[1] *Webb* v. *Outtrim*, [1907] A.C. 81.

[2] Act No. 7 of 1907.

[3] Act No. 8 of 1907.

In the ordinary jurisdiction of the High Court of the Commonwealth on appeal from the Supreme Courts of the States, the judgements of the Commonwealth have not received always very respectful handling from the Judicial Committee of the Privy Council: in one case which arose out of the interpretation of a law of New South Wales and affected the question of the degree of privilege which was allowed to a society which for gain carried on the work of giving information about the financial status of private persons, the result of the reversal of the decision of the High Court in favour of such societies possessing privilege by reason of interest was that the New South Wales Government introduced an amendment into their law [1] of libel which would have resulted in undoing for New South Wales the interpretation of the law as laid down by the Judicial Committee. The result, however, was not what was proposed: the Bill was so considerably amended before it became law that it could not be said to have accomplished its purpose in any degree. Nor, to do the then Prime Minister of the State justice, did he suggest that the view of the Privy Council was bad law: he merely thought that the law as it resulted exposed to too serious risks of heavy penalties firms who were performing a useful work in a country where credit is of much importance, and he considered that, if they did their work honestly and in a competent manner, they should be privileged in respect of a mis-statement as to a man's position made in good faith, without negligence and without malice.

In the case of the Union of South Africa far greater inroads in theory have been made on the royal prerogative than in any other Dominion. The *South Africa Act*, 1909, replaced the old procedure under which appeals came to the Privy Council from a considerable number of colonial courts, three in the Cape, two in the Transvaal, two in Natal, and one in the Orange River Colony, by the establishment of a new régime under which one Supreme Court for the Union was constituted, to which in its appellate division

[1] Act No. 22 of 1909; *Parl. Pap.*, Cd. 5135, p. 15.

all the appeals which formerly went to the Privy Council as well as others might come. From the divisions of the Supreme Court no appeal was henceforth to lie to the Privy Council, but from the appellate division only might an appeal be brought by special leave to the Judicial Committee. It was also intimated that the occasions on which appeals could be allowed were expected to be very rare indeed, as it was desired that the appellate division should in effect be the final appeal court for South Africa.[1] It must, however, be remembered that the state of affairs in the Union is somewhat unusual—the law in force there is Roman-Dutch law, and the lawyers of the Union are familiar with the peculiar variety of that law which applies to the Union: the Judicial Committee of the Privy Council has no such familiarity with that special law, and therefore it is not unnatural that parties in cases are not specially anxious to take their cases away from the domestic forum. Moreover, the bringing of appeals is especially a matter for wealthy firms and companies, and these are not in South Africa constantly engaged in litigation arising out of constitutional points as in Canada. The Parliament of the Union is, subject to the control of the Imperial Parliament, in effect a sovereign body, and cases of constitutional law of real importance will always, it may safely be said, be comparatively rare.

Efforts have of late years, especially since the beginning of the century, been made to arrange improvements in the Privy Council which will make the position of the court less open to attack on constitutional grounds. It is idle to suppose that the anomaly of a court which sits in England and which is not in any very obvious way in touch with Imperial issues can be regarded universally with satisfaction, and there has always been a certain current of opinion in the Dominions in favour of the restriction of the right of appeal. The Constitutions of the Commonwealth and the Union both permit legislation by Parliament to restrict

[1] The expectation has been fully realized; appeals have almost disappeared from the Court in its Union jurisdiction.

the right of appeal, but the legislation for this end must be reserved for the signification of the royal pleasure, and no responsible Government has gone so far as to introduce a Bill to this end. Nor have the Dominions yet put forward a demand for the restriction of appeals, and indeed there is a fair amount of evidence that the statesmen of the Dominions have not yet reached the stage of holding that it is a matter of importance or even perhaps really desirable that the appeal should be taken away. The possibility of occasional ebullitions of feeling is always present: New Zealand some years ago was bitterly moved by a judgement which was, it held, based on the totally wrong-headed view that the New Zealand Government had been trying to neglect native interests, and from this time dates the strong antipathy of Sir Robert Stout, the Chief Justice, to the Privy Council. The disputes between the Privy Council and the High Court of the Commonwealth created strong feeling both for the Privy Council and against it: the States thought that it was upholding their rights and the judgements of State courts: the Commonwealth feared that its influence would be thrown on the side of the States. In Canada of late years it has rendered some constitutional judgements of great value from the point of view of calming popular feeling: its decision [1] that the House of Commons of Canada had no power to enact a general Marriage Act providing for the universal conditions of recognition of validity of marriages, in face of the fact that under the constitution the provinces have the exclusive right to legislate regarding solemnization of marriage, put an end to an inconvenient and troublesome agitation based on the fact that the *Ne temere* decree was supposed to have legal validity in Canada, as was suggested by the decision of one judge in a Quebec case of a marriage of two Catholics by a Protestant. On the other hand, feeling in Quebec in 1913 was somewhat strongly moved by the decision of the Privy Council in the case of *Cotton* v. *Rex*.[2] The matter was one of succession duties: all the provinces of the

[1] [1912] A.C. 880. [2] [1914] A.C. 176.

Dominion are anxious to get as much revenue as they can in this way, and they therefore seek by every device whatever to secure that revenue by evasions of the rule which limits them to taxation of property actually in the province. The Privy Council in that case did not, however, as in an earlier case,[1] discuss the matter on the subject of the nature of taxation within the province, but instead they dealt with the matter as of indirect and direct taxation. The Provincial Legislatures are limited strictly to direct taxation and are not allowed to levy indirect taxes, so that the problem was whether the taxation in this case was direct. The scheme of the Act in the opinion of the court was that it levied a duty on all movable property wherever situated of a man who died domiciled in the province, and required that every executor, administrator, trustee, universal legatee or notary before whom a will had been executed should furnish within a certain time a schedule of the estate. The collector of revenue then intimated the amount of duty payable which the declarant had to pay within thirty days. The collector could thus recover the money from the declarant, who would in most cases be merely the notary, who in his turn would have to recover the money from the estate or, more correctly, the people concerned in it. Now, if an ordinary case were taken of movable property in New York dealt with by the will of a person domiciled in the province, the legatee could obtain the sum outstanding under the law of New York without showing that he had paid duty in Quebec, and the case would clearly arise of the declarant in Quebec being a person who was not expected to pay the duties in respect of this legacy at all, but to recover them from some other person. This could not be direct taxation within the meaning of the words in the *British North America Act*, which clearly contemplated as direct taxation only what was held by Mill to be such taxation. The Privy Council therefore held the whole scheme of succession duties in Quebec invalid.

[1] *Woodruff* v. *Attorney-General for Ontario*, [1908] A.C. 508.

The Act was obviously a rather unpleasant blow to the Government of Quebec, which was put in the position of losing all its revenues from the duties and of having a crop of actions for the refund of duties already paid. The Legislature therefore hurriedly set to work in January 1914 to enact measures to establish the tax as a direct tax, and one of these measures was directly aimed at the Judicial Committee. It recited that the judgement rested in large measure on conditions which were non-existent, the alleged obligation of the notary to pay the duties, as under art. 1380 of the *Revised Statutes*, 1909, the notary was expressly exempted from the class of persons who must make the declaration, and therefore be liable to pay the duties, and it asserted that the Acts regarding succession duty all agreed in not taxing the person making the declaration, but did tax immediately and without benefit of recourse the beneficiaries under the Acts. It proceeded, however, to spoil the effect of its assertion that the case was decided on the ground of an error, which was obviously not the case, though the remark regarding the notary was an error, by admitting that the rule by which a declaration was made by one person only and he became liable to pay the whole duty on the estate to the collector, was introduced by an Act, 58 Vict. c. 16, s. 2, which was passed merely to obviate the trouble under the old rule, by which every person had to send in an inventory, though each was only liable to pay on his share of the estate. Moreover, it argued, even if one person could be called upon to pay the whole amount, which was not the intention of the Acts, though it might be possible under their terms, still he did not pay in the expectation of indemnifying himself, but he merely paid as representative of the other heirs out of the common estate. It further stated that, as those who paid succession duty before the introduction of the new procedure were not entitled to recover back the duties paid, clearly it would be unfair to these persons if persons who had paid subsequently could recover the duties paid, and it accordingly provided that the intention of the Acts was and had been, that every person to whom property or any interest

therein was transmitted owing to death should pay to the Government, directly and without having a recourse against any other person, a tax calculated on the value of the property as transmitted, and that there should be no right of action against the Government for the recovery of any money heretofore or hereafter paid to it in respect of succession duties for the reason only that the taxes were not direct taxes. The Act was not to apply, however, to pending or decided cases. It is clear that the enactment validating what had been done is of doubtful validity, since what is not a direct tax cannot be made a direct tax by any effort of the Provincial Legislature, and a provision forbidding an action has no validity if it deals with an action for an illegal act of the province, since it shares in the illegality of the action under the Constitution, but the enactment presumably secured the position as to future tax-payers. On the other hand, the passing of such an Act was a clear breach of the courtesy due to the Final Court of Appeal, for even had the Act been correct in point of fact and the decision of the court much influenced by the fact of the notary paying—which was not the case—the terms of the preamble are unwise. It remains, however, curious that the error should have been committed: the case was argued as always by expensive Canadian counsel, who must have been guilty, one would think, of some error in their presentation of the case.

Apart, however, from ebullitions of feeling of this kind, it is clear that the permanent acceptance by the Dominions of a court in London is impossible, unless that court can be so enlarged as to give the Dominions some just feeling that it is an Imperial court. The arguments which can be adduced for the retention of the appeal to a purely colonial court, as the Privy Council may rightly be said to be, as colonial appeals occupy its attention far more than anything else, and as its judgements are not binding on the British courts, are not of sufficient importance to induce the Dominions to accept it permanently. It is true that the court is of some value as dealing in a uniform way with the prerogative of the Crown which is, generally speaking, identical in all the

Dominions, but this is subject to local legislation and therefore is often to be interpreted, not on the broad basis of the ordinary law, but on the special basis of local Acts. It is also true that it is a body which in cases of strong political excitement in a Dominion may be relied on to be calm, and give an unbiased judgement. There is, too, a special propriety in entrusting to it such cases as the boundary dispute between South Australia and Victoria, which it disposed of very satisfactorily, for the settling of such disputes is part of its historic functions, but for this purpose it must be remembered that it need not have been invoked in its judicial attitude proper: the power of the Crown to make special references could have been used as in the case of the disputes over the Ontario and Quebec boundary in 1878, and Ontario and Manitoba in 1884, and the pending reference in the case of the Newfoundland and Canada boundary. The English common law, however, is so far from alive in most parts of the Empire where it is now in part embodied in statutes, in part changed by legislation, that the function of the Privy Council in maintaining uniformity of law is not to be taken very seriously.

But there would be some real temptation to the Dominions to take part in the reconstruction of the Judicial Committee if they could be given the assurance that the body would be concerned with appeals from England, Scotland, and Ireland, as well as with appeals from the Colonies, and that the membership of Dominion judge[s] really welcomed. The two things must go togeth[er] long run, and the ideal of the Dominions, so far [as] not prefer to have the abolition of the appeal [as] that expressed by the Commonwealth Government in 1901, at the Conference[1] held in that year in view of the passing of the *Commonwealth of Australia Constitution Act*, in which for the first time the prerogative was seriously affected by the exclusion of constitutional cases in certain instances from its purview. It was then suggested that there should be constituted an Imperial Court of Final Appeal, including Dominion representatives,

[1] *Parl. Pap.*, Cd. 846.

one for Canada, one for Australia, and one for South Africa being suggested, which would exercise the whole jurisdiction of the House of Lords on appeal, and of the Judicial Committee, on Colonial and Indian appeals. The court was also to include an Indian judge, and was to sit in two divisions, on one of which could be a Colonial judge and on the other one Indian and one Colonial. For special cases the two divisions would sit together, and the expert opinion of the judge most familiar with the subject-matter of any case would be utilized by the Lord Chancellor as the ground for assigning one case to any division. The proposal, however, was not then generally acceptable to the Colonies, and nothing further was done for the moment.

Of the two ideals of the Commonwealth view in 1901, the first, that there should be one court only of appeal for the whole Empire, has been left in practically the same position as in 1901. The latter, the question of the addition of Colonial judges, has been dealt with piecemeal, and on the whole rather unsatisfactorily. The first step was taken in 1895, when by the *Judicial Committee Amendment Act*, 1895, it was rendered possible to add to the Privy Council not more than five persons being Privy Councillors who were also, or had been, Judges of the Supreme Court of the Dominion of Canada, or of any of the superior courts of the provinces, or Judges of the Supreme Courts of the Australasian Colonies, and the two South African Colonies, or other Colonies named by the King in Council. The number of five was only gradually made up: the Chief Justices of Canada, of the Cape, and of South Australia were appointed in 1897, and later, in 1904 and 1901, were added Sir H. E. Taschereau, the new Chief Justice of Canada, and Sir S. Griffith, the Chief Justice of Queensland. The places of the two older Canadian judges were taken by the appointment of Sir C. Fitzpatrick, Chief Justice of Canada from 1906, and of Sir E. Barton, of the High Court of Australia. But there was no provision in the Act for the payment of the judges, and as a result, though they might sit occasionally, that could only be on rare visits, when judges came to the United Kingdom on other business

at their own expense or at the expense of the Government which they represented. In 1907 the discussion at the Conference[1] led to no definite result, except that it was agreed that it would be a good thing to re-codify the rules regarding appeals from the Dominions, provinces and states, and to make the conditions more even. Not only was this done, but a useful step was taken by giving the courts in the provinces, the states, New Zealand and Newfoundland, the power wherever they thought fit to allow an appeal to the Judicial Committee. The old rule applied only to appeals in certain defined cases, and if the cases did not fall within the exact wording of the rules, the appellant had to ask special leave for his appeal, and though in point of fact this could be obtained reasonably easily, and occasionally the application could be treated as the trial of the case, still the possibility of waste of time and effort, not to mention money, was always present. But in more serious matters nothing was done of importance. An Act of 1908 provided that a judge of a Colonial court from which an appeal was being heard, or a judge of a court to which an appeal would lie from that court, might if available be summoned as an assessor at the hearing of the appeal. Moreover, it added the High Court of Australia and the Supreme Court of Newfoundland to the lists of courts whose judges, if Privy Councillors, might be members of the Judicial Committee, and added to the South African Colonies the two new Colonies the Transvaal and the Orange River Colony. The first clause remained a dead letter, and the second merely had the effect of qualifying Sir Edward Barton as a Privy Councillor to fill the first vacancy in the number of five judges which occurred.

The discussion at the Imperial Conference of 1911[2] was in effect little more satisfactory. The Dominion Governments were not united in desiring anything: Canada had to think of the provinces, and Sir Wilfrid Laurier wished to leave things alone: New Zealand was anxious to have a New Zealand judge to hear cases on appeal from that

[1] *Parl. Pap.*, Cd. 3523. [2] Ibid., Cd. 5745.

Dominion, as matters affecting native land were of great importance to the Dominion, and the Dominion was anxious that no mistakes should be made in dealing with such questions. The Union of South Africa did not wish any appeals to come save in the most infrequent cases, and had no interest in any change of the court. Australia had lost some of its enthusiasm for any action, and had apparently an insufficient knowledge of the position, due to the absence of a lawyer on the delegation and the usual imperfect preparation of the subject which marks all Imperial Conferences. The only result was that the Conference agreed that a change should be made in the rule under which, as being in theory an advisory body, the Judicial Committee delivers but one judgement without indication of dissent. In the place of this rule it was unanimously agreed that it was right that the judges who dissented should be allowed to express their reason for their dissent, though the Lord Chancellor deprecated the proposal as being in his opinion unwise and tending to diminish the respect felt for the judgements given. Despite the unanimity of the resolution it was never carried into effect: on second thoughts the new Government of Canada disliked the idea, and the other Governments on second thoughts nearly all concurred in thinking that the new Government of Canada was quite right. The other change made was one which was merely based on Imperial needs: it was desired by the Imperial Government to secure the addition of two Lords of Appeal, and it was thought that the putting forward of the proposal under the guise of a resolution of the Imperial Conference would bring the House of Commons, which was then in a mood for economy, to accept the idea gladly. Therefore the proposal was made that two new judges should be added, to be used both in the Privy Council and the House of Lords: the Conference, which had not proposed the idea and which clearly did not care a straw for it, acquiesced in a matter which they made it plain did not really concern them, and the Government presented the proposal to the House of Commons and compelled its acceptance on the strength of the Conference reso-

lution, it being clear that hardly any of the members who discussed the Bill in the Commons or the Lords had looked at the Conference Debates on the point at issue. At the same time it was agreed that the anomaly of fixing the number of representatives of the Dominions on the Committee under which New Zealand could not be represented should be removed, and that the number who might be appointed should be raised to seven, while to avoid difficulties arising from the comparative amount of representation of the Dominions the King in Council should be empowered to arrange which Privy Councillors who were qualified should sit so as to secure due representation of the Dominions. Accordingly, an Imperial Act, 3 and 4 Geo. V, c. 21, provides for the addition of two Lords of Appeal to the four already appointed under the *Appellate Jurisdiction Act*, 1876, the raising to seven of the number of Privy Councillors who, if Colonial judges shall be members of the Committee, the substitution of the Union for the four South African Colonies, and the grant of power to the King in Council to regulate the manner in which eligible Privy Councillors shall in future be given places. The only result of the Act as far as the Dominions were concerned was the appointment of Sir Joshua Williams to represent the Dominion of New Zealand. A new departure was, however, made in his case: not only did the Government take the appointment seriously, but they actually sent the judge home to sit on cases, and on his death decided to replace him by Sir R. Stout.

The opportunity had been afforded by the passing of the Act to take a real step towards the creation of a genuine Imperial Court, a step too of a simple kind, which would not have fettered the discretion of the Government if it had proved that the step was not a wise one. It would have been an easy and a gracious act to give one of the new appointments to the most distinguished of Dominion judges, Sir Samuel Griffith, whose long career as statesman and a judge had won him the respect of the whole of the Commonwealth, and recognition even in the United Kingdom. By his appointment to act both in the House of Lords and in the

Privy Council, which would have meant the giving him an adequate salary from Imperial funds in the first instance, though doubtless that point could have been arranged with the Commonwealth if it were preferred that part of his pay should be derived from the Commonwealth, the beginning of a true Imperial Court would have been provided, and in his case the doubtless sometimes just remark that Colonial judges need not be, and often are not, of the same calibre as British judges of the highest orders of rank, could not be said to be applicable. Unfortunately, the indifference which characterizes statesmen of both parties to questions of Imperial sentiment, and the unwillingness of the Commonwealth to press forward a claim that they had constitutionally[1] no right to make, prevented advantage being taken of the opportunity.

The responsibility for the failure to take this step must rest with the Liberal Administration, which is the more remarkable in that the Lord Chancellor at the time, Lord Haldane, had for years been noteworthy for his advocacy of an Imperial Court, and it might have been expected that in accordance with that opinion he would have eagerly welcomed the opportunity afforded to him to carry out the policy of his pre-ministerial days. Curiously enough, after the chance was over, presiding at a series of Rhodes's lectures delivered in University College, London, he drew attention, in connexion with the question of the reform of the House of Lords, to which the Government of which he was a member was pledged, to the fact that the reform when carried out would make a new Supreme Court of Appeal for the United Kingdom necessary. On his visit to Canada he had been struck with the feeling among those most competent to give an authoritative opinion, that if any change took place with regard to the Final Court of Appeal they did not wish to have a court outside the Dominions. The opinion of Canada set value on an appeal to the King in Council: there was no desire to alter it, and if any change in judicial arrangements

[1] Perhaps, too, the personal friction between the Government and the Chief Justice had its share in this result.

was necessary, it was hoped that the foundation and principle of that appeal and the form of the court would not be varied. The same view would also probably be taken by all the self-governing Dominions, and it meant that they regarded the King in his Privy Council as something not outside themselves. He suggested that the true line of future development would be that all appeals, whether from the Oversea Dominions or from the United Kingdom itself, should lie to the King in Council, as was proposed in the case of Irish appeals under the Government of Ireland Bill. The Judicial Committee had already been strengthened by adding two more judges: it might be with increased responsibilities that an Act could be passed enabling it to sit in more divisions than one, and enlarging its membership. As the King was not a local but an Imperial institution, as the King was present in each of his Dominions and represented by his ministers, and as the Imperial Privy Council was an Imperial body existing for, and drawing members from, all parts of the Dominions, and containing on its Judicial Committee chief justices and judges from all points of the Empire, they had at once a court that did not offend against the canons which the self-governing Dominions wished to set up, namely that their Supreme Court of Appeal should not be outside themselves. If the Judicial Committee could sit in more than one division, a solution would be found of difficulties which had taxed more than one statesman. Supposing they had a boundary case in Canada, as had been the case some time ago, it would then be easy to send members of the Judicial Committee from London to sit in Canada and determine the question. They might, for example, invoke the assistance of the Chief Justice of Australia, who had been sitting in the Judicial Committee hearing appeals from various parts of the Empire, and indeed the Chief Justice of South Africa had been sitting to hear Scottish appeals in the House of Lords. The instrument available in their hands should be developed by transferring all appeals whatever to the King in Council, and by dividing the Judicial Committee into divisions which would sit in the several parts

of the Empire from time to time, thus helping largely towards the solution of the question of Imperial unification. This solution would be in precise accordance with the existing principles of the constitution of the Empire.

The proposal thus adumbrated has not yet received any endorsement or, on the other hand, dissent from the responsible Governments of the Empire. It has been less discussed than its importance merits. There are obvious advantages in a procedure by which appeals could be tried, say in Canada or Australia, without the expense of the present procedure of bringing the counsel employed to London, but it is right to note that the present system owes some of its popularity with counsel in the various parts of the Empire precisely to the fact that it gives them opportunities for visiting England, and, while this consideration may be dismissed as not very material, this would be to ignore the importance of contact between the people of the Dominions and those of the mother country, especially in the case of the educated classes of the Dominions, who lose much by being isolated from the main current of the affairs of the world. On the other hand must be set the fact that the visit of a distinguished body of judges to a Dominion would probably be an event of much intellectual profit to the Dominion, and that it would inevitably be of advantage for Imperial unification. But it must be quite clearly realized that the scheme must be one in which Dominion judges play their due part in looking after English, Scottish, and Irish cases. If the Parliament of Ireland should legislate in such a way as to call into activity the powers of the Privy Council in interpreting the range of its authority, there must be no hesitation to employ colonial judges as part of the court to hear the case: there must be no attempt to delude the public with words which seem to mean that the House of Lords and the Judicial Committee are parts of one Imperial Court of Appeal, whereas in point of fact they are in no sense of the word such parts, since, while the judges of the one may sit in the other, the judges of the other cannot sit in the House of Lords, unless on the rare occasion when one like Lord de

Villiers happens to be a peer and a *persona grata*. Of course with the project of the disappearance of the House of Lords as a judicial tribunal would disappear any ground for a distinction between the different aspects of the Judicial Committee, and the Dominions could have their proper place.

With the giving of such a place it might be possible to expect the Dominions to pay their judges. It would probably be enough to give the Dominions each the right to appoint one, and the two greatest of them the right to appoint two, making seven as at present, while, if the Newfoundland choice were to become ineffective at any time by the inclusion of Newfoundland in the Dominion, then Canada could have three, the numbers of course being varied as occasion might require from time to time. The cost of paying these judges, once they were real workers, would naturally fall on the Dominions, with the exception of the case of Newfoundland, in which the salary might be defrayed by the Imperial Government, but that is a matter of wholly infinitesimal importance. On the other hand, if all the appeals of the United Kingdom were to go to the court, it would be necessary to reconsider the question of the final appellate courts in the Dominions, with the aim of diminishing, if possible, their numbers by removing the existing highest Courts of Appeal. In the case of Canada and the Commonwealth, already many of the provincial and the State appeals never go near the Supreme Court of Canada and the High Court of Australia: it might be a matter for consideration how far these courts could not be relieved of their merely appellate jurisdiction, and confined instead to the work of federal jurisdiction proper. Similarly the appellate side of the Supreme Courts of New Zealand and the Union might be dispensed with if there were available for a definite period in each year a court of the King in Council sitting in the Union of South Africa or the Dominion. The objection that some delay might result will not be regarded as very serious, when it is remembered that the power to deal with urgent matters can easily be exercised by some court below, and that appeals which go

to the highest tribunal are always lengthy. There would on the other side have to be set the fact that there would be no possibility of further appeal, and that the cost of appeals would be greatly lessened. But the ingrained conservatism of lawyers renders such a change very far from probable.

Moreover, such a procedure would have the advantage of creating a body which might be set to deal with those disputes between the Imperial Government and a Dominion Government and Dominion Governments *inter se*, which must arise as long as there are human beings in existence and conflicting interests to consider. There would be no need to treat such a body as suitable for dealing with purely political questions which must be reserved for some other body, but they could well be entrusted with the settlement of other forms of legal dispute, such as form the subject-matter of the ordinary treaty of arbitration. To such a tribunal could well have been referred the question of the position of the deportees from South Africa in the beginning of 1914, had the question not been amicably arranged before the necessity arose of pressing the matter to any kind of decision.

A body of the nature contemplated would of course be well able to undertake all the miscellaneous duties of the Privy Council, special references on such questions as the Canada-Labrador boundary, the removal of colonial judges in the case of the Crown Colonies, appeals in prize matters, in ecclesiastical law, and a number of minor powers under such Acts as the Patent Acts, the Endowed Schools Acts, and so forth.

By Act 5 and 6 Geo. V, c. 92, provision has been made to enable the Judicial Committee to sit in more than one division, primarily to facilitate the disposal of prize appeals, but the step is of possible future importance.

D. THE AMENDMENT OF THE CONSTITUTION

CHAPTER XVII

DOMINION PARLIAMENTS AND THE CONSTITUTIONS

THE paramount position of the Imperial Parliament results in a fundamental distinction between the Imperial Constitution and that of any self-governing Dominion. The Imperial Parliament cannot bind itself: it can fetter itself as much as it pleases, but it can cut its fetters asunder at pleasure. It may provide that no Act shall be passed to alter an Act which it has passed save by a two-thirds majority of both Houses, but the next Parliament may by simple majority repeal the offending Act, and it is in vain that the effort to bind itself had been made. But in the case of a Dominion the position is not so simple. Any rule whatever which has been laid down by any legislative authority with regard to the mode of modifying the constitution is a fetter on the freedom of the Dominion Parliament which it cannot break save in the way appointed by the Act imposing the fetter. If a Dominion Parliament enact to-morrow that any Act which it passes must be passed by a two-thirds majority to take effect as an alteration of the constitution, then this condition becomes one which, so long as the Act in question stands, cannot be undone by the Parliament save in the prescribed manner, that is to say, if the Act has been careful to make it clear that this provision itself is to be protected in this way. In Queensland indeed, in 1908, it was found possible to evade a difficulty that no alteration of the constitution of the legislative Council could be made except by a two-thirds majority in the Council by repealing the proviso in the Constitution Act of 1867, which made this necessary, as the proviso itself was not covered by the requirement,

but the really effective method of requiring that the ma
should apply also to any alteration of the law affecti
principle would secure the effectiveness of the rule.
limit thus put on the powers of Dominion Parliament
first sight rather curious, but it follows inevitably fro
express provision in the *Colonial Laws Validity Act*,
that the power of constitutional alteration there ac
to every representative legislature shall be exercised i
manner and form as may from time to time be requi
any Act of Parliament, Letters Patent, Order in Cou
Colonial Law, for the time being in force in the said C

The actual limitations which apply to the Dominio
States are extremely various. At the one end of the
stands Canada, and at the other the Commonwea
Australia; the other Dominions occupy an interm
position. The constitution of Canada was the result
agreement of four colonies, and the fact that the federa
was in effect a treaty has never for a moment been for
by any of the parties to that pact, and was indeed exp
recognized in 1907 by the Dominion Government, and
Imperial Government, when the British North Americ
was amended as regards the payments made to the
vinces.[2] The amendment was only carried out when
ascertained that all the provinces were in full agre
that it should be made, and that the only difficulty wa
British Columbia was anxious to get more than it was
but preferred to have something rather than nothing.
occasion is of interest for another cause: the Parliam
the Dominion, naturally enough from its own point of
but from the point of view of the Imperial Parliament
unconstitutional manner, wished the Act to declare th
settlement of payments by the Dominion to the pro
contained in the Act was to be final and unalterable.
a declaration could not have been placed in an Act wi
an absurdity, since the Imperial Parliament cannot
and ought not to purport to bind a successor, an
difficulty of meeting the wishes of the Dominion a

[1] 28 and 29 Vict. c. 63. [2] 7 Edw. VII, c. 11.

avoiding an unconstitutionality, while at the same time meeting the objection of British Columbia to any action by the Imperial Government, which could be interpreted as an indication that that Government was not prepared to allow its chance of obtaining better terms any weight, was relieved by reciting in the Act the resolution of the Canadian House of Commons, in which the agreement of the provinces was expressed and in which the Dominion view of the final and unalterable character of the settlement was set out. In point of fact the new Dominion Government recognized that the province had a grievance, and set up an arbitral tribunal to decide the question what additional sum ought in fairness to be allowed to the province.

Hence it follows that in all fundamentals the constitution of Canada cannot be changed by the Dominion Parliament. In many matters, of course, the constitution can be altered: but these are minor matters, not matters of the first order of importance. Even the mode of increasing the number of members of Parliament is determined on a population basis, a fact explicable of course by the federal principle. The most serious thing is, of course, the position of the two Houses: they stand in such a relation that the certainty of friction whenever there is a change of Government is produced, and such friction has always been produced. The system of life nomination is a thoroughly bad one in any country where the nominations are made solely on political grounds, and, while it was recorded that Sir John Macdonald only once gave a Senatorship to a political opponent, it was denied of Sir Wilfrid Laurier that he ever was guilty of that indiscretion. The Senate accordingly in the long régime of the Conservatives from 1878 to 1896 became a mere Conservative stronghold, and it mortally offended Sir Wilfrid Laurier by refusing to accept his proposed railway to the Yukon, a fact to which he was wont to trace the loss of the Alaska boundary arbitration, but at any rate, after the Liberal régime from 1896 to 1911 the Senate proved itself at least as obstructive to the new Government as its predecessor had been to the Liberals. The position was obviously

difficult: the only power of overriding the views of the Senate was that provided by s. 26 of the *British North America Act*, 1867, which merely allowed the addition, by the authority of the Crown only, of three or six Senators, and as the Imperial Government laid down in December 1873, when the use of this power was applied for by Mr. Mackenzie, when he came into office on the defeat of the first Ministry of Sir John Macdonald in that year, the power was only intended to be used for the settlement of some serious deadlock, when the numbers on each side were equal. The addition of six members in the early years of the Borden Ministry would have been quite useless save to add to the debating power of the Government. In 1912 the Senate, under the direction of Sir R. Cartwright, who had, even under the Liberal Government, been anxious to make it a more active body, threw out three Bills: they amended a Bill to set up a tariff commission in such a way that the Government had to drop it, they insisted that subsidies for road-making in the provinces should be on a proportional basis, and they would not give a subsidy to the Temiskaming-Ontario railway on the ground that the railway had been built and was working at a profit, and needed no subsidy. The more obvious reason for the refusal was that Ontario was the centre of the Conservative authority and therefore unpopular with the Senate. A further attempt to interfere with a Bill granting a subsidy to the British Columbia section of the Canadian Northern Railway was a failure through the error of the member in charge of the Opposition in thinking that the Bill could be amended, which, as the matter was a money Bill, the Speaker of the Senate ruled was impossible. A subsidy of 100,000 dollars a year to Prince Edward Island was opposed, but there was a split in the Liberal camp, and the Bill was passed by 15 to 12 votes.

In 1913[1] matters were not better between the two Houses. The most important action, of course, was that of the Senate in rejecting by 51 votes to 27 the Naval Aid Bill, providing for the grant of 35,000,000 dollars for the construc-

[1] *Parl. Pap.*, Cd. 7507, p. 51; *Canadian Annual Review*, 1913, pp. 441, 442.

tion of ships for the British Navy, to which reference has been made above. But the Senate also declined to approve proposals made for the grant of assistance in road-making to the provinces, unless the strict system of proportional payments per head of population was adhered to, and unless the Government dropped the clause in the Bill authorizing the expenditure of the proposed subsidy moneys by the Minister of Railways and Canals in a manner agreed upon with the Provincial Legislatures and Governments. They further ruled out as inadmissible proposals which were made by the Government to authorize the Minister of Railways, with the consent of the Governor in Council, to construct lines of railway not exceeding 200 miles in length, and to purchase lines not exceeding twenty-five miles in length, unless the contract of purchase or other document was laid before the Parliament for approval, an arrangement which the Government contended would deprive the Bill of all possible value to them. Nevertheless, in 1914 the Government managed to carry out most of its proposals, and the decision to arrange a satisfactory settlement of the question of redistribution with the co-operation of the Opposition was widely approved. Under the redistribution as settled the numbers of the House of Commons were re-arranged as follows:—Ontario, 82; Quebec, 65; Nova Scotia, 16; New Brunswick, 11; Manitoba, 15; British Columbia, 13; Prince Edward Island, 3; Alberta, 12; Saskatchewan, 16; and the Yukon, 1. The marked changes were of course in the western provinces, where the census had shown the great growth of population: Ontario lost four members, the unit being adjusted by the sixty-five allotted to Quebec, and being based strictly on the number of voters; Nova Scotia and New Brunswick two apiece, Prince Edward Island one, while Alberta and Manitoba won five each, and the other two provinces six each. The growth in the population of the west rendered it necessary and desirable to increase the number of their representatives in the Senate, but there arose a serious amount of friction over the question whether the increases proposed to be made in the number of the Senate

by assigning six Senators each to the provinces of Alberta, Saskatchewan, British Columbia, and Manitoba, should be postponed, in effect, until after the coming into operation of the new representation of the Lower House at the general election. The Government objected strongly to this proposal, on the broad ground that the question of increasing the Senate had nothing whatever to do with the question of the Lower House, and that it was based on the simple consideration of the numbers of the population, which had increased since the last census in such a way as to leave the proportions anomalous, seeing that the great provinces of Saskatchewan and Alberta had, like Manitoba, but four members apiece, and British Columbia but three, which was quite out of proportion with the populations of the provinces, as contrasted with the provinces of the east. The Opposition, however, remained firm, alleging, with of course much truth, that the aim of the Government clearly was to provide themselves as soon as possible with a majority in the Senate, which the increase of the numbers of members, plus the rapid process of death in an assembly where most of the members are not young at appointment, would soon bring about. Eventually the Government decided to give way on this point, and the necessary Imperial legislation was procured for effecting the additions.[1]

The necessity of invoking the aid of the Imperial Parliament induced the Canadian Government to clear up obscurities in its position in respect of the Senate. The *British North America Act*, 1867, provided for a Senate of seventy-two members, representing in equal numbers the three divisions of Canada, Ontario, Quebec, and the maritime provinces of Nova Scotia and New Brunswick. It was also provided that, if Prince Edward Island should come into the Union, it should be included in the third division, the two provinces losing two each of their Senators, which would fall to Prince Edward Island, and this took place in 1873. If Newfoundland were to be added, then it would have four Senators of its own, and not be included in any one of the three divisions.

[1] *Parl. Pap.*, Cd. 7897; 5 and 6 Geo. V, c. 45.

The importance of these divisions lay in the fact that if the Crown were to approve the addition of three or six Senators, in order to decide some deadlock, one or two, as the case might be, were to be taken from one of the three divisions of the Dominion. The anomaly of the position of Newfoundland in this case would have been negligible, but the position became more difficult when the grant of powers to the Dominion in 1871[1] and in 1886[2] to set up new provinces and to give them representation in Parliament, and to assign representation in Parliament to parts of Canada not included in any province, enabled Canada to create new Senators. In virtue of the power thus given by the Act of 1871, Canada set up the province of Manitoba in 1870,[3] with a maximum of four Senators, and those of Alberta and Saskatchewan in 1905,[4] with a maximum of six Senators, the number to be subject to increase to that figure after the decennial census of 1911. The number in the case of Manitoba was also made a maximum of six when new territory was added by the Dominion Act of 1912.[5] It was therefore possible for the Parliament of Canada to increase to six members each the representation of these provinces in the Dominion Parliament, without recourse to the Imperial Parliament. But, on the other hand, the terms of union of British Columbia allowed only for the appointment of three Senators, and, as these terms could not be altered by Canada, the aid of the Imperial Parliament had to be invoked if the number were to be raised to six. Further, the same aid was needed to divide the Senators into a fourth group, consisting of Manitoba, British Columbia, Saskatchewan, and Alberta, each with six Senators. The creation of this group necessitated the alteration of the number of Senators who could be summoned by direction of the Crown to four or eight, one or two from each of the four divisions of the Dominion. At the same time the number of Senators which would be allotted to Newfoundland if she entered the Union was increased to

[1] 34 and 35 Vict. c. 28.
[2] 49 and 50 Vict. c. 35.
[3] 30 Vict. c. 3.
[4] 4 and 5 Edw. VII, cc. 3 and 42.
[5] c. 32; *Parl. Pap.*, Cd. 6863, p. 18.

six, and a long cherished wish of Prince Edward Island was granted, by enacting that no province should be represented in the House of Commons by fewer members than the number of her Senators, thus preserving from annihilation the representation of the province in that House by four members.

It is not very easy to see how the position of dependence on the Imperial Parliament in the case of the Dominion is to be altered. It would be different if there were any sign of the provinces being willing that the Dominion should be entrusted with greater powers in this regard, but the provinces treat the matter with much emphasis and are not in the slightest degree likely to consent to any change which would place their legislative power in any further degree in the hands of the Dominion. The constitution of the Dominion must therefore remain *in statu quo* until the provinces and the Dominion can agree on some system under which alterations can be made independently of the Imperial authority.

In the case of the Commonwealth, not merely the constitution of the Commonwealth itself, but also that of the States in their relation to the Commonwealth, is subject to alteration, for the power to alter the constitution is expressly conferred by the constitution, and can be exercised by an absolute majority vote in the two Houses, followed by submission to the electors in the Commonwealth: any change must be approved by a majority of the electors and a majority of States, and, if it affects the position of the provisions of the constitution relating to any State, or diminishes its number of Senators or its minimum representation in the House of Representatives, it must also be approved by the majority of the electors in that State. If the two Houses disagree on a proposed amendment, then, after either has passed it twice with an interval of three months in the same or subsequent sessions, the Governor-General may submit the matter to the electors, though in the one case in which the exercise of the power has been sought it has not been accorded. The power is by no means free from doubt: the constitutions of the States are expressly continued in operation subject to the constitution, until altered by the State in

accordance with its constitution, and this at first seems to give the States an independent position. But the power of alteration extends to the whole constitution, and there seems no reason to doubt that the Commonwealth constitution might be so amended that the State constitutions disappeared in their present form: it has already been proposed in the Commonwealth Parliament to legislate so as to create a unitary in place of a true federal Government; the proposal has the strong support of the *Bulletin*, and must therefore be regarded as one of the ideals which the Commonwealth Labour Party will endeavour to carry out. In the meantime the great question is that of the giving to the Commonwealth of wider powers on all subjects of trade and commerce, and, though the concession of these powers will certainly not leave the State Parliaments bereft of all authority, it will deprive them of the important part of the work which they do, and diminish effectively their value as legislative bodies.

The States themselves are under few restrictions as to constitutional changes. The Act of 1907, which was passed to sweep away an intolerable muddle in the matter of the reservation of Bills, which threw no credit on the drafters of the constitutions of the Australian colonies, provides merely for reservation of Bills affecting the constitution of the Legislature, and even this phrase is made less serious than it might seem, on the ground that it is defined not to cover cases of fixing the qualifications of the electors or of the members of elective Houses, the numbers of elective members, the districts for which they are to be returned, and the numbers for each district. There are also a few minor restrictions[1] under colonial Acts, but in the main the States can freely enough amend their own constitutions. The matter, however, does not end there: the constitutions are in some ways not exactly ideal or convenient to work, and the mere statement that a constitution can in law be amended has no value, if in fact the relations of the two Houses are now fixed in such a way that change is almost impossible. It is not desirable

[1] *Parl. Pap.*, H.C. 131, 1893; *Responsible Government*, i. 432-6.

that any country should have a constitution which cannot be altered constitutionally, and in four cases in the States there is always present the possibility of a deadlock.

In the case of Queensland and New South Wales the difficulty which arises is one which can always be solved, and accordingly Imperial intervention is not required. The right of rejecting and altering legislation, enjoyed by the Upper House in New South Wales, is subject to the fact that the House can be swamped, and would no doubt be swamped if it were found that it persistently refused to accept Bills sent up by a Ministry possessing the control of the electorate. In the unquiet period which intervened between 1911 and 1913, the Upper House was never confronted by a really strong Government: the Labour Ministry held office by the skin of its teeth, and was often apparently on the point of collapse: a minister of importance, Mr. Beeby, resigned on December 9, 1912,[1] and another of the scanty majority was absent on a mission in the United States. The treatment of Bills by the Upper House was not unreasonable: they accepted an Income Tax Bill which was not a model of legislation: they rejected very properly the ridiculous proposal that death sentences should be relegated for consideration to a Council of Judges, as a mere effort to evade the moral responsibility which must rest with an executive Government. They also rejected a proposal that all persons in receipt of poor relief should be at once enfranchised. A Gas Bill, which as introduced might perhaps be described as predatory, they altered into a fair and reasonable shape, following British precedents of regulating the cost of gas to the consumer on the one hand and the rate of profit on the other. In 1913,[2] however, it had to come more directly into conflict with the Lower House: that body was the scene of some proposed legislation which was perhaps not very seriously intended as a contribution to anything but the programme of the party for the general election. At any rate, the Council threw out a Fair Rents Bill to fix rents of certain houses in Sydney on the ground that it would

[1] *Parl. Pap.*, Cd. 6863, p. 109. [2] *Parl. Pap.*, Cd. 7507, p. 61.

do much more harm than good, and that it was economically quite unsound; a Bill to allow railway servants to appeal from decisions of the railway commissioner, which was a certain means of ruining discipline; a Bill to provide all public servants with superannuation allowances, a measure the finance of which was clearly sketchy; and a Bill to provide for an eight hours' day in the chief industries. But the Council had the excuse that the Government had a poor hold of the Assembly: its Vaccination Bill, introduced because of the fear of smallpox, was rejected on a non-party vote, when it was found that it would be otherwise defeated on a party vote; an [illegible] Bill for an underground railway in Sydney shared the same fate. The Government, moreover, did not venture to press for the ratification of the proposed agreement for the construction of railway lines by an English firm of contractors, on the basis of the State paying the cost, and the contractors having a commission, but advancing through an ingenious scheme the necessary funds. The result of the election in that year, however, was decisive in favour of the Labour Party: they won forty-nine seats to thirty-nine of the Opposition, with two independents, the victory being in the main secured on the second ballots, which went nearly all against the Liberals: the Independent Party, which had promised well, came to disastrous defeat. The Upper House at once recognized the changed position by accepting several items of legislation in a modified form, which the Government presented. It was expressly explained in the Upper House that, if the people should see fit to approve the projects of the Government, the Upper House held no brief to alter these proposals in matters of first-class importance.

The Upper House, however, retains quite a valuable power over the construction of public works under the *Public Works Act*.[1] That Act lays down the principle that no public work which is to cost over £20,000 shall be commenced without the adoption of the procedure of referring it on the motion

[1] The same principle has been followed in the Commonwealth by Act No. 20 of 1913; *Parl. Pap.*, Cd. 7507, pp. 34, 35. The limit there is £25,000.

of a minister in the Assembly to a Committee, consisting of three members of the Upper and four of the Lower House. On the report of this Committee the Assembly decides whether the matter should be proceeded with, and, if it passes a resolve to that effect, a statutory duty is imposed upon the minister to bring in a separate Bill to carry out the proposed work, and of course such a Bill may be rejected by the Council without th inconvenience of rejecting a general Appropriation Act. In 1911 an attempt to insert an appropriation in an ordinary Bill appropriating moneys was defeated by the distinct ruling of the Speaker that the Act of 1900 could not in this way be overridden.

In the case of Queensland the nominee Upper House is now placed in a definite relation to the Lower House by the provision for the reference to the people at a referendum of a measure which on being twice sent up by the Lower House the Legislative Council will not pass. This provision in the law has definitely, it may be taken, destroyed the right to swamp the House in normal circumstances, though it might be that in a case of great urgency, when there could be no referendum from considerations of time, this course of harmonizing the views of the two Houses might be used. In the years since 1908 up to 1914 there was no serious possibility of disagreement between the two Houses, as the Government of Mr. Kidston, after carrying the legislation of 1908, was much altered in composition and views by the making of an alliance with the Opposition and the breaking up of the agreement with Labour, by which the change in the constitution had been effected. Even so, however, in 1911 the Upper House dealt somewhat severely with a Licensing Bill, by insisting that the majority to authorize the closing of licensed houses under the local option system should be three-fifths, that Sunday closing should be limited, and that increased compen ation should be paid to licence holders who suffered from the effect of the Act. The Government on some of the points could not give way, and it took steps to put the referendum into operation,[1] but in

[1] *Parl. Pap.*, Cd. 6091, p. 71.

the session of 1912 the matter was disposed of by mutual accommodation. The position, however, is seriously altered by the defeat of the Government of Mr. Denham, who succeeded Mr. Kidston in the leadership of the joint party on the retirement of the latter from political life in consequence of domestic bereavement, and who definitely adopted a more conservative line of action than his predecessor, at the election in 1915. The Government had won much distinction by its firm handling of the great strike at Brisbane at the beginning of 1912, but the victory then achieved was frittered away by means of a somewhat amorphous policy, and the Labour victory of the Commonwealth helped to give Labour in the State a chance of reasserting its position, and, although there exists a simple means of deciding any ordinary dispute between the Houses, the Lower House has declared in favour of abolishing the Council.

In the other four States, with their elective Upper Houses, Victoria has twice in the past been the scene of grave disputes between the two Houses, but it is doubtful whether the risk of friction is so great now as it then was. The Upper House is not very extreme in its views: the men composing it are in the main reasonable in political outlook, and treat the questions submitted to them in a moderate and, indeed, committee spirit. In 1911[1] there was an example of the usual relations between the two Houses: the Upper House so altered a Wages Boards Bill as to render it unacceptable to the Lower House, and a Bill for cold storage they altered by reducing from £84,000 to £9,000 the appropriation which it was proposed to make. Under the constitutional powers of the Upper House this reduction could only be put as a suggestion, but the lack of distinction between a suggestion and an alteration was seen when the Upper House persisted in its suggestion, and thus compelled the Lower House to lay aside the Bill, since obviously it had ceased to be the same measure at all; indeed, the Upper House would not even agree to allow the £9,000 it was willing to spend to be spent in the way proposed by the Lower House. The

[1] *Parl. Pap.*, Cd. 6091, p. 70.

Government was annoyed, and, as a general election followed shortly, they declared that it was part of their policy to secure the passing of legislation to facilitate a decision in the case of disagreements between the two Houses: it is doubtful whether the proposal was meant very seriously, as the Upper House was not in the slightest degree likely to pass any such Bill, but in point of fact, when the Government succeeded in being returned to power at the general election, the Upper House accepted their victory as a sign that they should agree to the Cold Storage Bill, which accordingly received their concurrence without substantial amendment, and became law. But the future is not without elements of doubt: Victoria has never had a real Labour Government: one Labour Ministry only has ever held office, and that nominally for a few days as a mere incident in a competition in December 1913, between two opposing factions in the Government. If the Lower House should become in time Labour, then the Upper House which, like all the Upper Houses of Australia that are elective, is based on a property qualification in the electors, which is higher than that for the Lower House where adult suffrage prevails, has a long record of successful resistance of the Lower House behind it, and trouble might easily result. For this there is no obvious means of solution unless by the action of the people and Parliament of the Commonwealth, in the form of a change of the Commonwealth Constitution, which would be a very difficult and hardly proper mode of effecting a settlement, or the intervention of the Imperial Parliament, which, as it alone has the power in the case of deadlocks to break the deadlock, would have to intervene if a really good case were made out. Even in 1914 the Upper House delayed for a whole month the passing of a very important Bill for the control of prices, a fact which was believed to have told against the Liberals at the federal election of that year.[1]

In the neighbouring State of South Australia, in the course of 1911,[2] very serious difficulties arose between the two Houses, for which the intervention of the Imperial

[1] *Round Table*, 1915, p. 681. [2] *Parl. Pap.*, Cd. 6091, pp. 70, 71.

Government seemed to the Labour Government to be the only remedy. The Labour Government, which took office in 1910, introduced a measure to bring about the solution of differences between the two Houses on the basis that if the Lower House passed a measure three times, a general election intervening between the second and third times of passing, each passing being in a separate session, then, if the Council rejected the Bill, the Bill might be presented to the Governor for the royal assent. The Bill was passed through the Lower House by the necessary majorities of 21 to 15 and 21 to 10, on its second and third readings, as required by the constitution, under which absolute majorities are needed for the passing of legislation altering the constitution, but the Upper House rejected it on the second reading. But the Upper House went further: at the end of the year it threw out the Appropriation Bill on the ground that it contained items for the establishment of Government brick and timber works, which were to supply these commodities for the use of the public at large and not merely for governmental purposes. The result of this action on the part of the Upper House was to determine the Government of the State to make an appeal to the Imperial Government. What they asked in their appeal of November 2, 1911, was that the Imperial Government should provide the safety-valve that was necessary to settle a deadlock which there was no constitutional means of overcoming, by intimating that the constitution would be amended by Imperial Act, if the Council did not accept in principle such a measure as had been submitted and had been rejected. They pointed out that the intention of the constitution had been always to be a democratic one, that the original proposal in 1853 to have a nominee Upper House was rejected precisely on the ground that it would be undemocratic, and instead a system of elective Houses with different constituencies had been adopted: that the result of this differentiation, aided by female suffrage, had been to strengthen the position of property owners: that in the United Kingdom the Crown afforded a means to reconcile the will of the people and the

action of Parliament by insisting on submission to the popular will by the Upper House, but that in South Australia no such power existed. A dissolution would merely mean the return of the Council by its electors to retain its old position. The Government also pointed out that of the electors only 33 per cent. of those on the Assembly rolls were electors for the Council, while even of this number only 13 were able to return half the members of the Council. In the previous year the Upper House had already rejected a land tax measure and a Bill for adult suffrage for the Upper House. Their position, however, was weakened in 1911 by the fact that they had found themselves unable, through the defection of one of their supporters, to press their franchise measures upon the House. Moreover, the Legislative Council argued in the matter of the rejection of the Appropriation Bill that the compact of 1857 between the two Houses on the question of Money Bills was expressly made on the understanding that the Appropriation Bill was not to contain provisions for new and unusual heads of expenditure, but that such heads were to be made the subject of separate proposals. There could be no doubt that in this point the Council had a complete case: the compact of 1857 was passed precisely because the constitution contained no provision regarding the powers of the two Houses as to Money Bills, and therefore some arrangement had to be made if any work was to be done. The Government in return argued that the agreement of 1857 was unconstitutional: that the agreement between the two Houses was a departure from the spirit of the constitution, which was meant to follow that of the United Kingdom; and that therefore the power of the Upper House to deal with Money Bills should be held to be non-existent. The argument was clearly bad: apart from the fact that it was idle to argue in 1911 against an agreement which had prevailed, more or less continuously observed, since 1857, it is certain that the relations between a nominee body and an elective body and two elective bodies could not be regarded as analogous to each other. The real strength of the argument of the Government, so far as it

existed, would have been in the fact that the Upper House was defying the will of the people, and the small and uncertain majority of the Government in the Lower House made that position impossible to uphold. The refusal of the Imperial Government to intervene, on the ground that intervention was only possible if all constitutional remedies had been exhausted, and only then on a request of a large majority, and if essential to enable the work of the State to be carried on, was clearly and plainly inevitable. The Labour Government evidently recognized that this was the case: they at once advised a dissolution of Parliament with a view to strengthening their hands in the struggle, and the Upper House readily passed a Supply Bill for £800,000, to let affairs be carried on. The election of January 1912 was disastrous to the Government, and Mr. Peake took office with a majority of 24 votes to 16.

The new Government then secured the passing of the Appropriation Bill, but deleted the offending items. They further took occasion to place on record, in a memorandum of April 24, their disapproval of the action of their predecessors in invoking the intervention of the Imperial Government, and they pointed to the defeat of the Government as an indication that the action taken by them in this matter had not been approved by the people of the State. They themselves, however, attempted to regulate by legislation the relations as to Money Bills of the two Houses, and, after introducing a Bill confined to this alone in 1912, they in 1913 laid before the House of Assembly an elaborate Constitution Amendment Bill which not merely dealt with the relations of the two Houses as to Money Bills, but also the constitution of Parliament, the franchise for both Houses, and the settlement of deadlocks generally.

The deadlock provisions were based on those in the Commonwealth constitution: they proposed that if a Bill were twice rejected by the Upper House, after being passed twice with an interval of three months in the same or successive sessions of Parliament, the Governor might dissolve both Houses, and, if this were done and the Upper

House persisted in its attitude, then the matter should be settled by a joint session of the two Houses. It was felt necessary to follow the model of having a dissolution before a joint session. Even, however, in this form the Upper House declined to accept any deadlock provisions, but they accepted the rest of the Bill with various amendments. By it the numbers of the Council were raised from eighteen to twenty, elected for five constituencies, four members in each, and the number of the Assembly from forty to forty-six, with eight three-member and eleven two-member constituencies. The franchise for the Upper Chamber was considerably extended, rather in theory than in reality, by the alteration of the occupation franchise, so as to include any inhabitant occupier as owner or tenant of any dwelling-house, and not merely one of £17 value yearly, with, however, no vote for joint occupation. As regards Money Bills, the Act repealed s. 1 of the Constitution Act, No. 2 of 1855–6, which provided that all Bills for appropriating any part of the revenue of the province or for imposing or altering or repealing any rate, tax, duty, or impost, should originate in the House of Assembly, and substituted the following provisions:—A Money Bill or money clause in a Bill shall originate only in the House of Assembly, and the Legislative Council may not amend any money clause. The Council may, however, return to the House of Assembly any Bill containing a money clause, with a suggestion to omit or amend such clause, or to insert additional money clauses, or may send to the assembly a Bill containing suggested money clauses which must then be printed in erased type, and shall not be deemed to form part of the Bill, requesting by message that the suggestion be given effect to, and in every case the Assembly may comply with the suggestion with or without modifications, but the power of the Council applies to the money clauses contained in an Appropriation Bill only when such clauses contain some provisions appropriating revenue or other public money for some purpose other than a previously authorized purpose or dealing with some matter

other than the appropriation of revenue or other public money. A Bill for appropriating revenue or other public money for any previously authorized purpose shall not contain any provision appropriating revenue or other public money for any purpose other than a previously authorized purpose. No infringement or non-observance of any of these provisions shall be held to affect the validity of any Act assented to by the Governor, and, except as provided as regards Money Bills, the Legislative Council shall have equal power with the House of Assembly in respect of all Bills. A Money Bill is defined to mean a Bill for appropriating revenue or other public money or for dealing with taxation or for raising or guaranteeing any loan, or for the repayment of any loan, and a money clause means a clause of a Bill which appropriates revenue or public money or deals with taxation or provides for raising or guaranteeing any loan, or for the repayment of any loan. A previously authorized purpose means a purpose which has been previously authorized by Act of Parliament or by resolution passed by both Houses of Parliament, or a purpose for which any provision has been made in the votes of the Committee of Supply whereon an Appropriation Bill previously passed was founded. No Bill or clause of a Bill shall be taken to appropriate revenue or public money, or to deal with taxation by reason only that it contains provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or for services under the proposed Act. Any revenue, money, taxation, or loans raised by local authorities are not within the scope of the Act.[1]

The Peake Government, however, was defeated in the election of 1915, and the Labour Government which came into power brought forward after the election in the first session of the Parliament in July 1915 proposals to undo the position of the Houses. The Governor's speech announced

[1] *Parl. Pap.*, Cd. 7507, pp. 39-41. There is a Committee on Railways as in New South Wales on Public Works under Act No. 1089.

measures for the restoration to the . use of Assembly of control over Money Bills, which they declared had been taken away from the people by the late Government in the Act of 1913. The measure was to be accompanied by a complementary measure for adult suffrage for the Legislative Council, the amendment of the electoral code, and the adoption of effective voting, with a rearrangement of the electoral districts, the constituencies having been in the opinion of the Government gerrymandered by the late Government in the Act of 1913. The speech also announced the change of the incidence of taxation by increasing the tax on unimproved land values, with reduction of income tax and the charges for conveyance of the produce of the primary producers. There is, of course, no prospect of the settlement of all these issues without much friction, and the possibility of Labour appeal to the Imperial Parliament must always be present so long as the Upper House is elected on a property franchise of any kind which differentiates the electorate quite considerably from the electorate by adult franchise for the Lower House.

The position in Tasmania is closely analogous to that in the case of South Australia. There, however, the Upper House is absolutely independent of the Lower in every respect, and no compact even regulates the relationships of the two bodies. On the other hand, the position of the Government in the Lower House is rendered ludicrously weak by the system of proportional voting[1] acting on the small number of members arranged in six-member constituencies. Hence the prospect of any serious conflict is minimized, since the Lower House realizes that, if it is able merely to carry a measure by one vote, it can hardly insist that the Upper House must hold that the wisdom of the Lower House is superior to its own, and a majority of ten or twelve against in a House of twenty-four members is very possibly a proof of better views than a majority of one or two in a House of thirty members. Hence even in the

[1] On this topic see *Parl. Pap.*, Cd. 7507, pp. 67–69, which summarizes a Tasmanian report.

emergency legislation of the war in 1914, the Upper House rejected certain measures as to control of prices and of foodstuffs sent up by the Lower House,[1] and it normally exerts as great an influence on legislation as the Lower House; it freely rejects and alters Bills every year, and alters Money Bills or rejects proposals of expenditure as it thinks fit.

In Western Australia the position is different: the power of the Lower House is constantly checked by the Upper, but the Upper is not so strong as in Tasmania, for the Lower House can show real majorities, at present overwhelmingly Labour in complexion and determined in character. The election of October 1911 gave Labour a majority of twenty in a House of fifty, and it carried much legislation, the Upper House declaring emphatically that it had no party character, and would consider all proposals submitted merely on that basis. It rejected, however, a proposal to set up a Public Works Committee on the model of that existing in New South Wales, and it further declined to accept the proposal of the Government regarding arbitration. In 1912[2] there was more friction between the two Houses. The Upper House rejected Bills for the setting up of State hotels, as it disapproved of municipal trading, for amending the land laws by the substitution of the principle of leasehold in every case for that of freehold, for setting up a Public Works Committee, for authorizing a railway from Norseman to Esperance, and a Land and Income Tax Bill. The State Hotel Bill was intended to control the liquor traffic, and it was pointed out by the Premier that at the local polls held under the existing Act the great majority of the voters in every licensing district, with few exceptions, had voted in favour of the holding of new licences by the State: under the Bill the Government would have had power to set up a State hotel in every licensing district. The majority in the Legislative Council, in rejecting the Bill, expressed readiness to consider it if restricted to defined cases, and a further Bill in this

[1] *Round Table*, 1915, p. 678. [2] *Parl. Pap.*, Cd. 6863, p. 111.

sense was accepted by the Council. In the support of th
Land Bill reference was made to the evil result of freehol
in the United Kingdom, where the absolute ownership o
more than half the land was enjoyed by 2,500 persons
while experience in Victoria with freehold showed that
despite the large alienation of land from the Crown, the
land cultivation had not increased for many years. It wa
the desire to set up a community of tenant farmers, cultivat
ing land under the State. All acquired rights were to remai
in force, and all contracts carried out. A lease of land i
perpetuity, with a rental at 2 per cent. of the assessed
unimproved value, was to take the place of freehold. I
reply, the Council argued that the principle of leasehol
had been abandoned in 1912 in New Zealand,[1] and that
France, Denmark, Norway, Belgium, Switzerland, and
Ireland showed the advantages of freehold. The same yea
showed some feeling between the two Houses arising out
of an incident in the action of the Government. In 1911–1
the Parliament had agreed to give a sum of £250,000 a
an advance to the Treasurer to meet expenditure which
from time to time might not be provided for, and the
Government used some of the money for the purpose of
purchasing steamers to provide a Government service to
the northern portion of the State. This interference with
private enterprise annoyed greatly the members of the
Upper House, who had mostly large business or agricul-
tural interests, and who did not wish any interference with
private concerns. When Parliament met in 1912, the
Upper House recorded its disapproval of the expenditure
of the money by the Government, and criticized adversely
a portion of the Governor's speech which seemed to claim
that the Lower House could by mere resolution legitimize
expenditure incurred by the Government. The Government,
however, made it clear that they made no such claim, as
was asserted, for the Lower House. But they insisted that
they could use at their discretion the sums placed at their
disposal by the Act of the preceding session. The Governor's

[1] Cf. *Round Table*, 1915, pp. 692, 693.

position in the matter was called into question, but it was vindicated on the ground that he had acted in accordance with the advice of his law officers and of the Ministry, and indeed it seems clear that his action was strictly legal, and that the error of the Upper House was in agreeing to the grant in the previous session without imposing conditions. In 1913[1] there was again friction in the two Houses. The Government proposed an initiative and Referendum Bill, which would have enabled the people to claim the submission to the electors of any measure passed by the Houses, and to demand the legislation of any measure desired by the electorate. This was rejected by the Upper House on eighteen votes to six. The Council also rejected the land and income tax proposals, and Bills for the setting up of a Public Works Committee, for the amendment of the Factories Act, and the construction of a railway from Esperance northwards. The position is in fact somewhat difficult, for the possibility of effectively coercing the Upper House does not exist, and its franchise has not yet been extended to cover all householders, as in South Australia: even if it were, there would still be no certainty of its being in harmony with the Lower House at any future date.

In the case of New Zealand the Legislative Council, originally composed of nominees for life, was modified in constitution in 1891 by the introduction of the limitation of the tenure of office by new appointees to seven years. The appointments made by the Liberal administrations, which held office for twenty years consecutively, were political in origin, and therefore after the very beginning of the Liberal Government, when the refusal of the Governor, Lord Glasgow, to add members to the number desired by Mr. Ballance to the Upper House was overridden by the Secretary of State,[2] the Houses had been in general harmony, the Upper House merely delaying the passing of measures which it distrusted, though in some cases it did so for considerable periods. This state of affairs came to an end by reason of the defeat of the Liberal Government in 1912,

[1] *Parl. Pap.*, Cd. 7507, pp. 62, 63. [2] *Parl. Pap.*, H.C. 198, 1893.

and the position became at once difficult. Even in the times of the Liberal Government there were many suggestions of alteration of the constitution, and in his last policy speech the former Prime Minister, Sir J. Ward, had suggested that the proper way to deal with the matter was to make the Upper House elective, the members being chosen by the Provincial Councils, which he also proposed to set up in order to deal with local affairs and relieve the Parliament of excessive centralization of business. In the session of 1912[1] the new Government brought forward a proposal to make the Upper House elective, consisting of forty members, elected by the North and South Islands in equal numbers by proportional[2] voting on the system advocated for the Imperial Parliament by Lord Courtney. The members were to hold office for six years, one-half retiring every three years: the franchise for both Houses was to be the same. While according the Bill, which was as a matter of courtesy introduced in the House affected, a second reading, and thus affirming the principle of election, the Upper House resolved by twenty votes to thirteen that the principle having been affirmed, it was not desirable to proceed further with the measure in the session then in progress, in order that the country might have the chance of considering the steps to be taken to give effect to this principle. The Government then proceeded in the Lower House by resolution to affirm the principles of their Bill, and asked the Council to pass a Bill to restrict to three years the tenure of office of the next appointees to the Council. It was explained that, as sixteen of the members would retire in 1914, it was desired to be able to fill their places with men whose appointments would terminate within the life of a single Parliament. But the Council would not proceed with the Bill. In the session of 1913[3] accordingly the Government again introduced the Bill with alterations.

[1] *Parl. Pap.*, Cd. 6863, pp. 117, 118.

[2] The system of second ballots was repealed for the Lower House by Act No. 36 of 1913.

[3] *Parl. Pap.*, Cd. 7507, pp. 69, 70.

In place of two great divisions there were to be four, two in each island: the members to be elected were now to be eleven for each of the north divisions and nine for each of the south, thus avoiding the unfairness of the original proposals. The mode of choice was to be the Tasmanian system of proportional representation, and the idea of a periodic retirement of half the members was to cease, the members holding office for five years from election, and then until the next dissolution of Parliament. The electors were to be the same as those of the Lower House. In the first place, however, as there were still some members who were entitled to remain members for life, or a portion of seven years, the elections would be confined to seven members for each of the North Island divisions, and five for each of the South, an unfair majority for the North, but unavoidable, since for proportional representation to work there must be an uneven number of members to be returned. Further, the relations of the two Houses were to be set up on a new model in place of the mere constitutional understandings of the past: the proposal made was a mixture of the procedure under the Irish Parliament Act and the Commonwealth Constitution Act. The Council was to have no power to initiate appropriation or taxation Bills: it could not amend any Bill imposing taxation or appropriating money for the ordinary annual services, nor amend any proposed law so as to increase a charge on the people. But in the case of any law which it could not amend it could request an alteration by the other House. A Money Bill which was to be defined in the manner of the *Government of Ireland Act*, when certified as such by the Speaker, must be passed by the Upper House within a month after it had been sent up, or it could be presented to the Governor for his assent. In the case of disagreement on any other kind of Bill, if passed twice by the Lower House in subsequent sessions, and rejected by the Upper, the Governor might convene a sitting of the two Houses, and, if the Bill were affirmed by a majority vote of the members sitting together, the Bill should be presented for the royal assent,

and if not the Governor could dissolve both Houses simultaneously.

For its part the Council set up a committee to consider the matter. The Committee came to the conclusion that the position of the Council should be in all matters that of the House of Lords as it stood before the passing of the *Parliament Act*, and that the Council should insist on its right to deal with Bills exactly to the same extent as the House of Lords used to do. They accepted as correct the view that the Upper House should yield to the Lower House, when it was seen that the views of that House represented the deliberate opinion of the nation. They also agreed that the principle of nomination should be abandoned in favour of election, and they then defeated by five votes to three the proposal that the Government plan of direct election by the same electorate as that of the Lower House should be resorted to. By six votes to two they rejected the proposal of one member that, as vacancies occurred, three-quarters of the Council should be elective and one-quarter nominee, and decided that the constitution of the Council should be limited to forty members, and that as each vacancy occurred the place should be filled by election by the members of the two Houses sitting together and voting by ballot. They further recommended that the tenure of office should be seven years, that the proposals of the Government regarding the powers of the two Houses should be accepted, and should be modified by the addition of the provision that, if after a dissolution of both Houses the Bill was again passed by the Lower House and rejected by the Upper, it could be presented to the Governor for his assent. They also made provision for the summoning by nomination of two Maori members to the Council, and of one member of the executive Council.

The difference of opinion between the two Houses was too complete to allow of reconciliation, but the possibility of any very decisive conflict was diminished by the contingency of the outbreak of the war, and the result was that the proposals of the Government became law as Act

No. 59 of 1914. The ensuing election, followed as it was by a series of election petitions and negotiations for a coalition, rendered the country indifferent to the question of the reform of the Upper House. But the position of that body must some day be definitively solved, and the problem is one of difficulty: it was, it may be added, doubted whether it was possible for the Parliament without the aid of the Imperial Parliament to effect the whole of the changes contained in the measure proposed either by the Government or the Committee of the Legislative Council. The doubt, however, seems to be somewhat mistaken: it is true that in certain respects the power of the Parliament of New Zealand to alter the Constitution Act of 1852 was expressly limited when express authority of alteration was given by the Imperial Parliament in the Act 20 & 21 Vict. c. 53, but this was prior to the passing of the *Colonial Laws Validity Act*, 1865, and the general power of constitutional change there given seems sufficient to cover any of the changes which in either of the Bills was proposed to be effected.

The Union of South Africa differs essentially from Canada, and resembles Newfoundland and New Zealand in being in effect a unitary colony, and the power of constitutional alteration possessed by the Parliament is therefore of the most extensive kind. The only restriction on the alteration of the Constitution are that none of the provisions for whose operation a definite time is fixed, as in the case of the appointment of Senators, shall be changed in that period, and that the provisions of the repeal clause 152 itself, of clauses 33 and 34 providing for the number of members in the Lower House and their mode of increase, of clause 35 relating to the franchise with its special provision to safeguard the native franchise in the Cape, and of clause 137 providing for the equality of language within the Union, as regards English and Dutch, shall not be repealed unless the Bill be passed by a two-thirds majority of the total number of members of the two Houses of the Union sitting together in joint session. There exists also

the restriction that any Bill which alters the constitution or powers of Provincial Councils as provided in the Act or that changes the provisions of the fourth chapter of the constitution regarding the Lower House shall be reserved, while any Bill altering the provision to this effect contained in s. 64 of the Act must itself be reserved. But these few technical points seem of very little consequence, and the Union of South Africa may be said without doubt to have within itself the full power of its own control. It must always be remembered that the provincial Councils cannot pass any law which contravenes any law of the Union, and that the Union Parliament can pass any law it likes and override the legislation of a Provincial Council.

In the case of Newfoundland and the provinces of Canada, the power of constitutional alteration is possessed in the widest degree. The provinces are, unlike the Dominion, free to change their constitutions at will save as regards the position of the Lieutenant-Governor, who is the bond of executive authority between the Dominion and the province, and who, therefore, in that aspect could not be made subject to change by the province. But the control of such constitutional change is exercised by the strong power of the Dominion Government, and therefore such alteration cannot be dangerous to the federation in any way. Newfoundland is subject only to the control of the Imperial Government, but it is difficult to conceive any way in which the desire to alter the constitution could arise. The Upper House, which is nominee, is however not directly under the control of the Government of the day, for unlike the case of New South Wales, Queensland, and New Zealand, the number of members who can be appointed by the Governor on the advice of ministers cannot rise above fifteen, so that, if any further members are needed, it is necessary to make the appointments by the issue of warrants by the King. This at once places the Government in the position that it has to satisfy the Imperial Government of the need for extra members to allow of the smooth

working of Government before the number of the Upper House can be altered. The number has from time to time been increased: in 1904 it was brought up to eighteen in order to secure the passage of any necessary legislation regarding the new arrangements with the French Government as to the fisheries, and in 1908 a further increase by three members was rendered desirable by the change of Ministry, which put the new Government of Sir E. Morris in the position of having a solid majority against them in the Upper House of some thirteen to five. The Upper House has, however, shown a sensible spirit of compromise, and, though it every now and then amends a Bill or throws one out, it does not do so in such a way as to cause needless offence or ill feeling.

In the provinces of Canada difficulties with Upper Houses can exist in but two cases. In the case of Nova Scotia the Upper House, which is in effect limited in number through the absence of any legal means of increasing the number, at one time was somewhat independent in its attitude towards the Lower House, which made an energetic effort to abolish it. But the Upper House has managed to retain its existence by dint of the process of consenting of late years to most of the measures of the Lower House, except any suggestion of its own abolition. In Quebec, where the Upper House is also limited in number, there has been no serious friction, and the House may well continue its existence undisturbed. But in either case, if serious deadlocks arose, they could be solved only by the intervention of the Imperial Government, since there is no power in the Dominion to alter the Constitutions, and there is no reserve authority, such as that possessed by the Governor in the Australian States and New Zealand and the Crown in Newfoundland, to intervene and compose differences by the addition of members to the Upper House in either case.

PART II. POSSIBILITIES OF UNION

CHAPTER I

IMPERIAL FEDERATION

1. Canada, the Commonwealth, and the Union

The essential characteristic of any federal system springs from the fact that a federation must be a compromise: it is a form of government which preserves multiplicity in unity, which admits that union is strength, but which insists that individuality must not be swamped. A federation may claim to be an organism, in that it should exhibit the most complete unity in diversity, each part being an indispensable member in the whole, but at the same time deriving its real effectiveness from its conjunction with other parts to form that whole. But in any case of a real as contrasted with an ideal organism experience shows that there are defects, and while in an organism not composed of conscious individuals capable of expression the failures of adjustment show themselves only in the imperfect individuality and success in maintaining itself of the organism, in the case of a federation the imperfection of adjustment expresses itself in friction among the organs of government. While therefore in theory a federation should be the most effective form of government inasmuch as the whole should be enormously strengthened by the individual character of the parts, in point of fact it is, so far as it yet appeared in the world, a much weaker form of government than it should in theory be. This loss of strength is due to the dissipation of effort caused by the disputes between the central and the local authorities, and not less by the fact that both central and local authorities in their executive and their legislative action are subject to the control of the federal courts, which may adopt a point of view satisfactory

neither to the federation nor to the states. In a unitary state the executive and the legislative powers stand in the closest connexion, and this connexion is also to be seen in most federations, but the judicial power in a federation stands apart from the other two powers in a very marked degree. In a unitary state the laws of the legislature are carried out by the executive, and their proper performance can be enforced through the courts, which are bound by them. In a federation the judiciary ceases to be a means of enforcing the will of the legislature and nothing more: its function includes the duty of scrutinizing the action of the legislature and the control of the legislature when it exceeds its due powers. The executive thus ceases to have the unquestioned duty of obedience to the legislature: it is entitled and indeed it is bound to ask whether the legislature is acting within the sphere of authority assigned to it or whether it is going beyond its bounds, and seeking to lead the executive into paths of error. Now it follows essentially from these considerations that unless the authority of the Parliament can be precisely defined in such a way as to leave no doubt as to its powers, there must be waste of power. The time occupied in considering problems of *ultra vires* must divert attention from greater issues, and the burden of reform must often be imperfectly borne from doubt as to the legal means of executing the reforms aimed at.

The same position in the central government and legislature is repeated in the case of the local governments and legislatures. They cannot well be certain of their rights and authority, either *inter se* or towards the federation, and the spirit of local autonomy is naturally felt most strongly in the minds of the executive officers, the legislators, and the judiciary of a province. The Government and Parliament will, experience shows, nearly always be more anti-federal than the constituents by whom the legislature is elected and the officers indirectly appointed.

These theoretical considerations receive, it must be admitted, very marked illustration in the case of the two

federations within the British Empire. In both cases federalism seemed destined to come without undue delay: in both cases the particularism of the units prevented the change of government being made until the force of circumstances made choice practically unavoidable. In the case of Canada federation was achieved thirty-three years before it came to pass in the Commonwealth, and it would be wholly idle to deny that the cause of the earlier fruition of the movement in the Dominion was essentially the danger which menaced Canada from the south, and which was so real that it was the essential ground why Canada was denied the title of Kingdom which Sir John Macdonald and his fellow leaders of federation would gladly have seen assigned to her. It was felt that the chance of the weak provinces of Canada maintaining themselves against the attractions of the United States, to annexation, for which there had been a strong movement in 1847, was much less than the probability of the resistance of a united Dominion conscious of future possibilities of greatness. In point of fact, even then the carrying out of federation was almost hampered by an accident. Prince Edward Island, which had at first consented to come in, decided at last to stand out; and Nova Scotia, after declaring for union, was completely carried over to the opposite opinion for a time by the eloquence of Howe. Had it not been for the cleverness shown by Sir C. Tupper as leader of the Government at the time in Nova Scotia and the eagerness of the Imperial Government to secure union,[1] the attempt would have been practically a complete failure, since New Brunswick could not with Canada have made a union worth bringing about. Similarly it was in large measure due to the influence of the Imperial Government that the newly created Canada was allowed to secure the Hudson Bay Company's territory and the North-West, and that British Columbia was induced to join the union, thus giving the Dominion the assurance of a brilliant future when the first difficulties of growth had been successfully overcome.

[1] *Recollections of Sixty Years*, pp. 69–73.

In the case of the Commonwealth the extraordinary difficulty of inducing six colonies with a fairly homogeneous population and, on the whole, similar conditions to federate without external pressure was exhibited. It is certain that in this case also something towards federation was contributed by reasons of defence. The feeling was gradually growing for years, especially after 1885, in the Commonwealth that further unity for defence purposes was necessary, and the obvious exposure of the Commonwealth to attack from any great power in the Pacific was realized by a number of statesmen. But the feeling was not strong: the movement for unity which began at the very outset of the history of the country was extraordinarily slow in developing, and it is plain that its development in the long run was feeble in the extreme, for the form of the Commonwealth Constitution shows the many compromises necessary to secure the consent of the States to union; and the State of New South Wales at the last moment would not agree to union unless it were given certain concessions, including the undertaking that the federal capital should be situated within its territory at such a distance as not to rival Sydney.

The result of the different circumstances of the two cases is obvious in the whole aspect of the Constitutions. The essential difference is seen at once in the attitude to the two federations as regards external affairs. In the case of Canada no doubt has ever existed that the Federal Government alone is concerned with the external affairs of that Dominion, in so far as a non-Sovereign State can have such affairs. This fact reveals itself very obviously in the case of treaties: it is not possible for Canada to become a party to any treaty through the King's adherence in respect of the Dominion, save on the condition that the whole of Canada is bound by the treaty: that is to say, the provinces have not enough individuality as units of Empire for His Majesty to undertake obligations in respect of some one of them by itself. For the same reason the full power is granted to the Parliament of the Dominion to legislate to carry out the treaty obligations of Canada. This power

applies not merely to obligations contracted before the union of the provinces, but also to obligations contracted thereafter: the most striking case[1] of this is the legislation passed by Canada under the Boundary Waters Treaty with the United States of January 11, 1909, and the Protocol of May 5, 1910, modifying the treaty in one respect. By s. 2 of the Act, chap. 28 of the Statutes of 1911, provision is made that the laws of Canada and of the provinces are amended and altered so as to permit the performance of the obligations undertaken by the Crown in the treaty and so as to impose the various rights, duties, and disabilities which are intended to be conferred by the treaty. Any interference with, or diversion from their natural channels of, waters in Canada which in their natural channel should flow across the international boundary or into boundary waters, which results in any injury on the United States side of the boundary, shall give the parties injured the same legal remedies as if the injury took place in Canada. Jurisdiction is given in any such case to the Exchequer Court of Canada. Power is also given to the International Joint Commission contemplated by the treaty to compel by application to a judge of the superior court in the province in which the sitting of the Commission is held the attendance of witnesses and to take evidence on oath, and provision is made for appropriation for the salary and the expenses of the Commission so far as they fall to be paid by the Dominion of Canada. It will be noted that the Act deliberately deals with provincial law as it thinks fit, and it does so without the consent of the provinces being obtained. There is no case of legislation like this in the Commonwealth as yet. Moreover, though the External Affairs Department of Australia is older in origin than the corresponding department in the Dominion of Canada, the latter since 1912, under the Prime Minister,[2] has far more reality and importance, mainly, of course, because of the fact that the proximity of the United States renders it necessary to maintain

[1] *Parl. Pap.*, Cd. 6091, p. 19; *Journ. Soc. Comp. Leg.* xvi. 5–12.

[2] See c. 22 of 1912, replacing c. 13 of 1909; *Parl. Pap.*, Cd. 6863, p. 16.

a constant stream of negotiations with that country, so that the British Ambassador, who is the intermediary, is always kept busy in dealing with the external affairs of Canada through the Governor-General—or sometimes less formally direct with ministers or the Under-Secretary of Canada, and the States Department of the United States.

In the Commonwealth the power to legislate as to external affairs was given to the Commonwealth by the Constitution, and an External Affairs Department early appeared on the scene. But the position of the Commonwealth in the matter of external affairs was early and energetically challenged by the Government of the State of South Australia.[1] The Dutch Government made a representation to the British Government that the authorities in South Australia had failed to arrest the crew of the ship *Vondel* as they were required to do under the terms of the Anglo-Dutch Treaty of 1856. The Imperial Government communicated the complaint to the Commonwealth, asking that Government to obtain a report on the alleged failure of duty from the State Government. The State, however, energetically declined to report otherwise than direct and at the direct request of the Imperial Government. It based its view on the provisions of the Constitution of the Commonwealth: the authority to which application in any matter should be made must be the authority which was entrusted with the legislative authority, and therefore the executive authority, by the Constitution; and, even when the Commonwealth had powe .ct, still the action must be not merely one which the Commonwealth could take under the Constitution, but action which it had empowered itself to perform by legislating on the topic. Thus there remained to the States all those matters in which the legislative power did not rest with the Commonwealth, and until legislation was passed by the Commonwealth all those powers which the Commonwealth could exercise but had not exercised, and the Commonwealth could deal only with the departments transferred to her control by virtue of the

[1] *Parl. Pap.*, Cd. 1587.

Constitution Act, e.g. customs, or matters on which it had legislated. But this division of authority in external affairs according to the legislative authority was not accepted by the Imperial Government or the Government of the Commonwealth, which insisted that the federation of Australia was not merely the creation of a seventh government beside the others, but of a new government, which for some purposes and for all external purposes must be regarded as above all the States. The responsibility for answering questions raised by foreign governments rested with the Imperial Government, which in its turn was entitled to ask the Commonwealth Government for an explanation, which that Government could ask from the State Government. To deal direct in such a case with the State Government would completely fail to fulfil the essential purpose of the Commonwealth Constitution, the creation as an external unit of one Australia. The State Government remained unconvinced, and the position is still unsatisfactory: if a State Government makes any representation which deals with external affairs, the Imperial Government will not deal with it until the Commonwealth Government have expressed their views, and they send all complaints to the Commonwealth, but the Commonwealth has no control over the States, and, if they refused to reply, could not make them reply. Nor, of course, has the Secretary of State in his action any legal authority to rest upon save his own opinion: indeed it may be doubted if the current of judicial opinion in the Commonwealth is not directly against his action, for the High Court of the Commonwealth has expressly used the term Sovereign States of the States of the Commonwealth, meaning by this to place them on the same footing of authority as the Commonwealth itself, from which it does not follow that the external affairs power excludes in any way the direct relation of the States to the real sovereign power, the United Kingdom. The real reason in favour of the course of action adopted is not a legal one at all, but is one of common sense. The Commonwealth Government has the military and naval

power in the Commonwealth: it has the customs power, and it must therefore be vitally interested in all matters of foreign relations and should be allowed to express its opinion in regard to them freely, and this can best be secured by making it the channel of correspondence. Even, however, this principle cannot be carried out rigidly: the legislation of the States is not subject to the control of the Commonwealth Government, and if clauses in that legislation offend, as was the case with a Queensland Act in 1911, the Imperial Government must forgo the pleasure of insisting on the correct mode of procedure and deal directly with the State Government, or it may be feared the State Government would not meet the views of the Imperial Government. Where the proper procedure of recognizing the position of the State in such a case is observed, as was the case with the Act in question, no difficulty in securing the preservation of treaty rights is found. Thus while the Queensland Act, No. 31 of 1911, was passed providing that no land could be leased to aliens unless the alien could pass a dictation test, it was expressly provided, in deference to representations made by the Imperial Government and received after the Bill had passed both Houses of Parliament, that nothing contained in the Act should prejudice the rights of any of the subjects of a foreign power between which and the United Kingdom of Great Britain and Ireland there was subsisting or should in future subsist any treaty of commerce whereby reciprocal civil rights of the subjects of such treaty powers were reserved, granted or declared, and to which treaty the State of Queensland had acceded or should thereafter accede. Similar legislation was shortly[1] afterwards passed by New South Wales to amend the error in the Land Act[2] of that State by which certain disabilities in respect of land-holding were placed on all aliens who were not naturalized within a certain time, contrary to the provisions of the Treaty of 1883 with Italy and the Treaty of 1859 with Russia.

In the case of treaties the self-dependence of the States

[1] Act No. 53 of 1912; 7 of 1913. [2] Act No. 6 of 1912.

is emphasized in two ways. While it is now clearly the established practice, as it ought to be, that accession cannot be expressed to any treaty without the desire of the Commonwealth Government, whatever the wishes of the States, it is not possible for the Commonwealth to accede to any treaty until it has secured the concurrence of the States and the promise or passing of the necessary legislation, if the subject-matter of the treaty falls within the sphere of the States in whole or part. In the second place, there is no theoretical objection to the King acceding to a treaty in respect of part only of the Commonwealth, though the policy of such action might be doubtful. The first point is the result of the fact that the Commonwealth power to deal with external affairs is of quite unknown extent, and there is no legal authority for the view that it confers on the Commonwealth Parliament the same power to enforce treaty obligations which is given in express terms by the *British North America Act* to the Dominion in Canada. If, therefore, the Commonwealth asked that accession be expressed to a treaty affecting matters of domestic importance, as for instance the necessary changes required in the law of the States to prevent the sale or manufacture of white phosphorus in matches if the international convention to suppress the use of this abomination is to be carried out, and if the States declined to legislate, the position of the Commonwealth would be hopeless. Similarly when the Opium Convention was accepted by the Commonwealth, it first of all ascertained that all the States concurred in the proposal. But the anomaly that the Commonwealth could ask that accession be declared for one State alone is remarkable and shows how feeble the unity of the Commonwealth is.

The same looseness of structure is to be seen in the procedure regarding the recognition of consular officers, on which there has been correspondence at various times and which has been discussed at the Premiers' Conference of 1914. The position is obvious that, if external affairs are to be taken *au pied de lettre*, the whole business of consuls should be handed over to the Commonwealth, and that all

requests from the Imperial Government for the recognition of consuls, provisionally or definitively, if there is no objection, should be addressed to the Commonwealth Government alone. It would rest, as in Canada, with the Commonwealth Government to consult with the State Government and to answer the inquiry on its own authority after hearing the views of that Government. The State Governments, however, at an early period in the history of the question brought any attempt thus to deal with them to an untimely end, by adopting the policy of simply taking no notice of any consul unless he had been approved by them. The result was, of course, that the consul, whose duties bring him into constant contact with the State authorities, would have found that the comfort of being recognized by the Commonwealth would have been somewhat void; and the Imperial Government, with good sense, resorted to the plan of asking both Commonwealth and State if they saw any objection to the appointment, the Commonwealth from the point of view of the relations of the proposed official with the Commonwealth authorities, and the State from the point of view of his communications with the State authorities. The importance of this procedure must be recognized when it is remembered that the consul is often a resident Australian citizen and that it is not desirable that men of any but excellent character should be appointed to these posts. In the case of a *consul de carrière*, the highest luminary in the consular firmament, no inquiry is needed, as an *exequatur* can be issued at once for him, and the Commonwealth and State Governments are merely informed of the recognition accorded by the King. There remains, of course, possible trouble in regard to the fact that the views of the two governments might disagree, but in that case it is to be hoped that in the interests of common sense the report would be treated as unfavourable. It would be absurd for the State to recognize a man whom the Commonwealth disliked and not less absurd to adopt the reverse course.

Apart, however, from external affairs in the fuller sense

of the word, there is a complete distinction between the Dominion and the Commonwealth in the relation of the local governments to the Imperial Government. The provinces of Canada are so subordinated in this regard to the Government of the Dominion that they are not at liberty to address correspondence to the Imperial Government on any topic, and the Dominion Government uses its discretion as to whether it will forward any correspondence it is asked to send on, and that discretion is often in the negative, even if the matter is one on which the province is very anxious to enlighten the Imperial Government, though it is perhaps fair to say that the failures to forward papers may be in some cases merely due to the propensity of all Canadians and provincial governments to lose all their papers. On the other hand, the Governors of the States correspond directly with the Imperial Government on all matters falling within the sphere of the States authority and often on matters outside that sphere, though in such cases they are required to send copies of their correspondence to the Governor-General for his information, and if the correspondence is public for communication if necessary to ministers. The Secretary of State, on his part, replies direct to all communications from the States unless they deal with federal matters, in which case he would normally reply through the Commonwealth; but in some cases, as we have seen, and notably in the case of consular correspondence, he does not adopt this plan, since it lies in the power of the States to refuse to act if he overlooks what they deem their rights in this matter, and he has no legal authority to support his view. The result of the quasi-independent position of the Governors regarding the Commonwealth and the Governor-General is inevitably to create friction between the Governors and the Governor-General. This is especially the case with the Governor of Victoria, who by residing in the town in which *de facto* the Governor-General has his abode pending the building of the federal capital at Canberra, vies with the Governor-General and cannot but be felt by the latter to diminish in some degree the

prestige of his position as the representative of the Crown. It would be contrary to human nature if the two viceregal personages were to be naturally on really good terms, and that they are so can hardly be asserted, though the degree of obvious lack of cordiality varies considerably with the personality of the men concerned. Of late years it is certain that in Victoria, since the appointment of Sir T. Gibson Carmichael to be Governor of the State, a real effo has been made by the Governor to ease the position, b it is inevitable that there should be difficulty, and the transfer of the Governor-General's residence to Canberra should be a fortunate period for the Governor of Victoria. On the other hand, it is doubtful if the Governor-General will really like banishment from the sea and Melbourne to the obscurity of a bush town.

The extent to which friction in these matters can be carried is revealed in a very curious manner by the famous dispute over the position of Government House, New South Wales, which was a *cause célèbre*, and on which the amount of learning spent was prodigious. The old Government House of New South Wales, a very fine building, was at the time of federation placed at the disposal of the Commonwealth Government rent free by the State of New South Wales, because it desired that the Governor-General, whose residence was during the session of Parliament to be at Melbourne, the seat of Parliament under the Constitution pending the building of a federal capital, should make Sydney his head-quarters in the recess. This arrangement was renewed in 1906 for a further period of five years, and when the agreement was about to expire, the Commonwealth Government suggested that it be renewed for one year. The New South Wales Government, which was not on good terms with the Commonwealth Government, thought that, if the agreement were extended, which it did not wish to agree to, but might do as a matter of courtesy to the Governor-General, it should receive rent for the house. But the Commonwealth discovered that it would be unconstitutional to pay rent, since while it had

an obligation to provide a residence for the Governor-General during the session of Parliament, and to provide him with temporary accommodation in the various other States than Victoria during the recess, it had not any right to pay a State a rent for a Government House. The argument was a silly one, but the Commonwealth was as angry with New South Wales as the State with the Commonwealth and the Governor-General had to suffer. On October 7, 1912, accordingly the last visit of Lord Denman took place, and the State Government then took charge of the house and began to turn the stables into a conservatorium of music, a proceeding which produced a good deal of amusement. The loyal citizens of Sydney, however, losing all sense of humour, after attacking the Government in vain in the Legislature, where its action was upheld by thirty-three votes to twenty-nine in the Lower House, brought an action against the Government for the purpose of obtaining an injunction against their using the house for any purpose other than a residence for the King's representative. The action was unique, for it was brought by the Attorney-General, on behalf of the members of the public concerned, against the King, and thus the Crown in effect sued the Crown; but the court decided that this was a very legitimate form of procedure, and pointed out that in the Commonwealth the Commonwealth and the States were constantly able to sue one another, a fact which was obviously not very much to the point. But the court found that the case of the Attorney-General was made out and that the Government House was vested in the King, dedicated to the purpose of serving as a residence for the Governor or representative of the Sovereign in New South Wales, and that the concurrence of the Imperial Government must be required before there could be any change in the position of the house, and that, as there was no hint that the Governor had ever approved the action, the matter having been dealt with by ministerial action alone, there was no possibility of the approval of the Imperial Government to the change ever having been given. The court therefore

granted an injunction against the proposed transmutation of the stables to purposes of music. The Government of New South Wales thereupon proceeded to appeal to the High Court of the Commonwealth, where the case was elaborately considered, and the decision of the court below reversed in 1913 on the reasonable ground that that court was wrong in holding that the house had remained the property of the Crown in its Imperial aspect, like the military reserves. On the contrary, the land and house had really passed under the terms of the Constitution Act of 1855, accompanied by the Act of that year relinquishing hold of the land in Australia to the control of the local government, and further, even if this were in doubt, by an Order in Council, made in order to surrender the reserved military lands to the Government of New South Wales in exchange for certain work for naval purposes done by New South Wales, the whole claims of the Imperial Crown to property in New South Wales had been handed over, so that the action of the Government of New South Wales had been in due order. This decision was upheld on appeal in 1915 to the Judicial Committee of the Privy Council, with the result that the Government House was left in the possession of the State Government and available for restitution to its rightful occupier, the Governor of the State of New South Wales, Sir Gerald Strickland.

In the case of Canada, on the other hand, the Lieutenant-Governor of a province is not appointed by the King but by the Governor-General of the Dominion, acting with the advice of the Privy Council of Canada, and he is liable to be removed by the same authority, subject only to the rule that the cause must be stated to the Parliament of the Dominion. The power is not a dead letter, as the famous cases[1] of M. Luc Letellier in Quebec in 1879 and of Mr. McInnes in British Columbia in 1900 have shown. The first case was that of Lieutenant-Governor of the Liberal Party dismissed by a Conservative Government as a result of his alleged improper dismissal of a Conservative

[1] *Responsible Government*, i. 226 seq.

Provincial Ministry: the second, of a Liberal by a Liberal Ministry, because he had set about to endeavour to turn the province into a good Liberal province and had dismissed a couple of ministries as a preliminary to this result, and had kept another Ministry in office for months without a parliamentary majority. But it is not to be imagined that the duties of a Lieutenant-Governor are normally supposed to be of this energetic type: he is usually a gentleman retired from political life, of mature years, anxious for a quiet life, and devoted, if to any form of activity, to encouraging charities: a good example of the best kind of Lieutenant-Governor is given by the history of the latter years of the life of Sir Oliver Mowat, when in retirement from the issues of his earlier years he governed Ontario to the satisfaction of every party and faction in the province.[1]

While the actual amount of control over the Executive Governments of the provinces exercised by the Governments of Canada through the Lieutenant-Governor cannot be said to be extensive, save in so far as all direct communication with the Imperial Government is cut off, the control of the legislation of the province by the Dominion Government is effective and direct, whereas in the case of the Commonwealth the Central Government has no control whatever over the legislation of the States, which may legislate on any topic they please, subject only to the royal veto and the control of the courts. The Dominion Government can disallow any provincial Act within a year after its receipt by the Governor-General from the Lieutenant-Governor, and this power has been exercised on very many occasions. In the early years of responsible government it is not too much to say that it was deliberately used as means for enforcing the interpretation of the Dominion Constitution which appealed to Sir J. Macdonald, and this was a very restrictive one. In later years this degree of control has been relaxed. For this there are several reasons: in the first place many of the imaginary limitations of the power of legislation laid down by the early opinions of

[1] See Biggar's *Life of Sir Oliver Mowat.*

Canadian Ministers of Justice, with whom lies in the first place the duty of reporting on the propriety of leaving provincial laws in operation, have disappeared under the efforts of the courts to interpret the constitution and to make clear the powers of the provinces. In the second place, the growth of the provinces has increased the sobriety of their legislation on the one hand and on the other rendered the Dominion Government chary of raising serious points of controversy with them. In the third place, the Dominion Government has gradually come to feel that it is not well for it to sit in moral censure on the acts of provincial governments, but that it should leave the operation of the laws passed by the provinces to be dealt with by the courts. This view was laid down by the Liberal Government in the year 1909, in the Cobalt Lake case, where it was contended that the Government of Ontario had intervened by legislation to deprive certain persons of the right which they enjoyed to establish certain claims to mining areas. The case on the facts adduced seemed to be a bad one of governmental action to prevent the men in question profiting by their diligence, but the Minister of Justice considered that the law, being constitutional, should not be interfered with by the Dominion Government. In 1911 the Conservative Government was invited to disallow an Act passed by the Alberta Legislature, c. 9 of 1910. This measure confiscated the moneys at the Royal Bank, which had been provided by certain investors in England on the strength of a scheme for the building of a railway by the Alberta and Great Waterways Railway Company, under which the bonds issued by the railway company in return for the money invested were guaranteed by the Govern. ent, and the money was to be paid out as the building of the railway progressed. The legislature mitigated in some degree the effect of the Act by passing another Act (c. 11) in which it was provided that any person holding himself to have suffered injury by the passing of c. 9 might within six months file a claim, which was to be reported on to the next session of the Legislature by the Lieutenant-Governor

in Council, but it did not admit the validity of any such claim. On the other hand, the guarantee of the bonds was repeated in the Act, c. 9. The reasons alleged for disallowance were partly constitutional, on the ground that the Act interfered with the law of banking, and that it affected to deal with rights not inside the province, and partly moral, that confiscatory acts were undesirable. The Government after examining the case in detail decided that, while they would not absolutely rule out the possibility of the disallowance of a provincial Act on the ground that it was unjust, they could not hold that the Act in question was so obviously unfair as to render disallowance necessary, especially as the Act, c. 11, seemed to indicate a desire on the part of the legislature to do justice, and the Premier had stated in the legislature, with the assent of both political parties, that the Government would do what was fair. Any question of constitutionality could best be dealt with by the courts, which in point of fact decided that the Act was invalid.[1]

The most characteristic cases of recent control of legislation are the series of disallowances of Acts of British Columbia aimed at the exclusion of Asiatics, especially Japanese, from the province, and their restriction in regard to kinds of employment when they were there. The position of the Dominion Government has always been in this regard strictly imperial: they have consistently disallowed such Acts, and have sought to find means of limiting migration by virtue of their own power. The courts have also helped them by declaring that the legislation of the Dominion, passed in virtue of the power to regulate treaty matters and immigration, overrides similar legislation on the part of the province, in so far as it conflicts with the Dominion legislation.[2] Of late the British Columbia Government, as a result of the advent of the Conservative administration in the Dominion, have ceased

[1] *Parl. Pap.*, Cd. 6091, pp. 66, 67. The Provincial legislation later on in 1913 repealed their legislation; *Canadian Annual Review*, pp. 645-50.

[2] *In re Nakane and Okazake*, 13 B.C. 370.

passing the objectionable Acts in such numbers. The use also of the intimation of disallowance in the case of the Saskatchewan Act, regarding the employment of women by orientals in 1912, secured the due amendment of that Act by confining its effect to Chinamen. On the other hand the Dominion have not felt obliged to prevent the exclusion of naturalized Asiatics from the provincial franchise, a power recognized as constitutional by the Privy Council, in the case of *Cunningham* v. *Tomey Homma*,[1] in which it was held that the power to legislate as to aliens, given to the Dominion exclusively by s. 91 (25) of the *British North America Act*, 1867, did not mean that no power to legislate was to be possessed by the provincial legislatures which differentiated against aliens or naturalized people, the power of the Dominion being apparently the power to confer the status of naturalization and to deal in some especial way with aliens, as in the Acts regarding alien immigration. The decision being later than must leave doubtful the meaning of an earlier decision in *Union Colliery Co.* v. *Bryden*,[2] in which it was laid down that it was not within the power of the legislature to exclude Chinese from any employment about mines, as the legislation was aimed at preventing them earning their living and therefore residing in the province, and was not a real exercise of mining legislation at all. The other matter in which the power of disallowance has been exercised within recent years is in an effort to compel provincial companies to restrict within closer limits the powers given to these companies. The provinces, in exercise of the right claimed by them to incorporate companies with power to carry on business outside the provinces, incorporate companies with objects covering business in all Canada, and in the last years of the Liberal administration the Minister for Justice carried on a disallowance crusade in support of his views as to the powers of the provincial legislatures in this regard.[3]

[1] [1903] A.C. 151. [2] [1899] A.C. 580.

[3] e. g. Order in Council of May 31, 1911, disallowing Quebec Act, c. 82 of 1910, an Act to amend the Charter of the General Trust.

The action taken was not intended to be in any way provocative, but it was based on the view that if these companies acted *ultra vires* they might bring loss on their shareholders. The whole question has since then been referred to the Supreme Court of Canada[1] and to the Privy Council, but even the Judicial Committee is hardly likely to decide all the possible niceties. The truth is that the provinces are anxious to extend their powers so as to make no real difference between a Dominion and a provincial company, but they have so far been defeated in that the Judicial Committee have decided in *The John Deere Plow Co.* v. *Wharton*[2] that the powers of a provincial legislature do not extend to passing legislation which would in effect deny the right of a Dominion company incorporated under the trade and commerce power, s. 91 (2) of the *British North America Act*, to carry on business within the province, without submitting to registration under a scheme framed to make a Dominion company in effect a provincial company in all matters.

The wisdom of the attitude of the Dominion Government in restricting in the closest possible way the power to disallow[3] has led it away from many difficulties and dangers, and it is doubtful if the power of disallowance has ever been of very great value save as an extreme remedy against the action of British Columbia. In the case of the States of Australia the disallowance of any Act by the Imperial Government on the request of the Commonwealth, or *proprio motu*, because it was unconstitutional, has never been attempted: it is clear, as was long ago pointed out by the Chief Justice of the Commonwealth,[4] when it was suggested that this would be a suitable mode of preventing

[1] 48 S.C.R. 331. Cf. the Privy Council decisions in *Bonanza Creek Gold Mining Co.* v. *The King*, and *Attorney-General for Canada* v. *Attorney-General for Alberta*, Times, Feb. 25, 1916.

[2] [1915] A.C. 330.

[3] An Ontario Act of 1911 regarding chartered accountants, disallowed because of its ignoring the position of British chartered accountants as entitled to use that designation in Ontario, was re-enacted in 1912 in the same form.

[4] 4 C.L.R. 1087, at 1126.

differences rising between the States and the Commonwealth, that the proposal would impose unbearable burdens on those who sought to decide what was and what was not constitutional, and that it would be most objectionable if these problems were not left to the decision of the courts in due course. The only way, therefore, of restraining the legislation of the States is by means of the judgements of the courts of the Commonwealth, or rather since the legislation of 1907 by the High Court, since that court alone has full federal jurisdiction in cases involving the consideration of the powers of the Commonwealth and the states *inter se*.

The action of the courts, however, while negatively doubtless of value, is as a positive factor singularly unimportant. Nothing can better illustrate this fact than the famous dispute which raged for years between British Columbia and the Government of the Dominion of Canada regarding the building of the transcontinental railway. The terms of union laid it down that the railway was to be built, but the question of carrying out the terms was one which could not effectively be brought before any court, and for years the indignation in the west was very high: Lord Carnarvon's interventions arranged a set of terms as a compromise, which after a good deal of difficulty and delay were at last carried into effect by the Conservative Ministry largely owing to the initiative of Sir Charles Tupper.[1] There have been many disputes between the provinces and the Government at Ottawa since that date, but many of them, such as the demand of Alberta, Saskatchewan, and Manitoba for the control of their public lands, which in the main are reserved under the direct administration of the Dominion as being responsible for immigration, are of minor importance, and have not led to serious difficulty. More importance no doubt attaches to the disputes with British Columbia on her Japanese immigration restriction policy, and the Government found it necessary to appoint a commission in 1902 to examine

[1] *Recollections of Sixty Years*, pp. 134 seq.

that question in full detail, and to seek to find some solution for the problem. The most famous of the later difficulties between province and Dominion was that arising out of the religious teaching in the schools of Manitoba. The difficulty arose out of s. 93 of the *British North America Act*, as applied to the province by the Canadian Act establishing the province. The educational system of the province which had at one time made a certain provision for Roman Catholic teaching, by allowing each denomination to do its own teaching, was altered into a defined system with rates, and the Catholic minority complained that they had to pay rates which were not applied for the maintenance of Catholic teaching, the Government having ceased to have any specific denominational character in the schools. It was decided by the Privy Council that the Manitoba legislation did not prejudicially affect any right or privilege existing at the time of union, and that at that time the only right or privilege enjoyed was that of paying for their own schools, but the satisfaction of Manitoba was later removed by the same body holding that the legislation of 1890 on which the difficulty arose did affect the position of the Roman Catholics in the province, and that under the third subsection of s. 93, the Governor-General in Council had a right to decide in what manner the local legislation should be modified to meet the situation.[2] The local legislature was not, of course, in the slightest degree prepared to yield and the Conservative Government, to its undoing, failed in the session of 1895 to deal with the matter. In 1896, as the Parliament was due to expire by efflux of time, the Opposition prevented the legislation to remedy the state of affairs in Manitoba, as authorized by the *British North America Act*, which the Government brought forward, from being passed, and the result was that the Government had to go to the country without having passed the legislation requisite. This fact was used by the Liberal Opposition to take away the confidence of Quebec, and on the other hand

[1] *City of Winnipeg* v. *Barrett*, [1892] A.C. 445.

[2] *Brophy* v. *Attorney-General for Manitoba*, [1895] A.C. 202.

there were many who objected to the coercion of a province in favour of Roman Catholics, and thus Ontario felt distrust in the Government which not unnaturally fell from office, because on the one hand they had tried to coerce a province to give too good terms to Catholics, and because on the other they had failed to relieve the needs of good Catholics. The new Government managed to bring about a compromise, but its permanency is again threatened.

Somewhat parallel to these cases of the ineffectiveness of certain judgements of the courts for enforcing obligations in a positive sense is the case of the action of the Government of the Commonwealth of Australia in the great strike at Brisbane in the beginning of 1912.[1] The origin of the strike was a dispute between the manager of the Brisbane tramway and the employees as to the right of members of trade unions to wear a trade union badge. The result was a strike, but, as non-unionists came in considerable numbers to replace the unionists, they called on the Trades Council to bring out other unionists in a sympathetic strike: this was done, forty-three unions being brought out, despite the fact that they had no dispute with their employers, while many were working on industrial agreements approved by Wages Boards and legally binding on masters and men alike. The men stopped all traffic in Brisbane for two days. As it seemed impossible to keep order with the small force of police available, the Government of the Commonwealth was asked under s. 119 of the Constitution to send military aid to protect the State against domestic violence. It was replied by the Commonwealth Government that the state of matters in Brisbane did not render such assistance necessary. The help was therefore not sent, and the State had, in the absence of any military force, to put down the rioting with civilian special constables. The State argued that the Constitution clearly placed an absolute duty upon the Commonwealth Government, and that the States would never have agreed to give up their militia on federation had not the right to the use of the Commonwealth forces been assured to them. It was

[1] *Parl. Pap.*, Cd. 6091, p. 71.

proposed during the federal conventions to restrict the right, but the proposed restrictions had been negatived. The real reason, of course, for the attitude of the Commonwealth Government was political: in the first place, the then Prime Minister, Mr. Fisher, who was a Queenslander, was a Labour member, and he showed his practical sympathy with the strikers in his usual indiscreet fashion by subscribing towards their distress funds. In the second place, the Labour Party had just learned from the Conference of the Labour Party at Hobart that the use of the armed forces of the Crown against strikers would be gravely condemned, and they were compelled therefore to violate the Constitution rather than offend the Labour Party, which had gone so far as to demand that the use of the forces against strikers should be made illegal, a step which the Government did not take, presumably because it would have been flying too openly in the face of the Constitution. The State Government talked of bringing an action against the Commonwealth Government for breach of their duty under the Constitution, but unhappily for the student of the Constitution nothing came of the proposal. The case was a bad one, public opinion in Australia refused to approve the strike: the Labour Party indeed were severely defeated at the general election which was then sprung on the State by the Government, and for three years was out of any possibility of gaining power.[1]

A good deal of disappointment was also for a long period expressed in Western Australia at the delay which ensued after federation in carrying out the agreement to make the transcontinental railway, on the faith of which Western Australia consented to enter the federation. Here again, as in the case of British Columbia, it was found impossible to bring the matter in any shape before the courts, and, fortunately for the Commonwealth, the visit to it of Lord Kitchener resulted in the realization that on military grounds the long delayed railway must be built, though all the Conferences which have taken place since 1911 have still left

[1] In the general election of 1915 they defeated the Government and came into power.

the Government unable to decide the exact mode of converting the railway gauges of the Commonwealth to the one gauge which military considerations render absolutely imperative.

From the negative point of view the courts are, of course, extremely powerful. But in the case of Canada and the Commonwealth there is the fundamental distinction that the constitution of Canada has been interpreted by the Privy Council, that of the Commonwealth almost entirely by the High Court under the provisions in the constitution under which the appeal to the Judicial Committee is made dependent on the consent of the High Court, a body which early in its history laid it down [1] that it was its duty not to allow appeals to go outside the Commonwealth. The principles of interpretation of the Constitution have therefore differed fundamentally. In all probability the application of the different principles has had far more effect than the formal differences in the distribution of legislative power in the two cases. In that of Canada reaction from the error in the United States which led to the war of secession resulted in the assignment to the Dominion of all residuary power, and to the grant to the provinces of only specified powers, but the effect of this rule is considerably modified by the wide character of the provincial authority in its defined powers. In the case of the Commonwealth the powers of the States in certain matters were definitely taken away, and in most matters left unchanged, but in many matters the Commonwealth was given paramount power of legislation. The necessity of conflict was fully recognized by the time when the Commonwealth was created: in the case of Canada it was assumed that the divisions were exclusive save in the specific subjects of immigration and agriculture, where the two jurisdictions might clash, in which case the federal law was to prevail.

In the case of Canada the general powers of the Parliament have been little resorted to, and the enumeration of powers in s. 91 of the *British North America Act*, though it is

[1] *Deakin* v. *Webb*, 1 C.L.R. 585; *Flint* v. *Webb*, 4 C.L.R. 1178.

expressly said not to be intended to restrict the generality of the Dominion power to legislate for the peace, order, and good government of Canada, in large measure covers the field of its actual legislative activity, just as the enumerated topics of the Commonwealth power cover the whole field of its activity. The powers in the case of Canada include the necessary powers of a civil government, namely the control of the property of the Dominion, the raising of taxation, the borrowing of money, the control of the public debt, and the provision of a civil service. The questions of Military and Naval defence are entrusted to the Federation, as are the postal department and the census and statistics. In regard to trade, besides a general authority to regulate trade and commerce, the Federation is entrusted with the regulation of weights and measures, currency and coinage, and paper money, banking, including savings banks, bills of exchange and promissory notes, interest, legal tender, bankruptcy and insolvency, and industrial property in the shape of patents of invention and discovery and copyright. Communications are placed under its control in the shape of ferries or lines of steamers from any province to a country abroad, railways, canals, telegraphs, &c., serving as means of communication between one province and another, and any other public works which are declared before or after their production, even if entirely within a province, to be for the general advantage of Canada, or of two or more provinces, by Parliament. Navigation and shipping, beacons, buoys, lightships and lighthouses, quarantine and marine hospitals, and sea-coast and inland fisheries are also assigned to the Federation. The criminal law with criminal procedure, and the provision of penitentiaries, and in civil law, marriage and divorce, together with aliens and naturalization, complete the record of exclusive powers.[1] It has also paramount powers as to immigration and agriculture.[2]

On the other hand,[3] the provinces have exclusive control of all matters of merely local or private nature in the province, and of property and civil rights in the province, of

[1] 30 and 31 Vict. c. 3, s. 91. [2] Ibid., s. 95. [3] Ibid., s. 92.

local works and undertakings where not assigned to the Dominion by reason of their affecting the whole of Canada or two provinces, and of municipal institutions. It has also the full power to provide for the administration of justice, including the establishment of both civil and criminal courts, and civil procedure: it can provide prisons and reformatories, and impose fine or imprisonment for breaches of its laws. Like the Dominion, a province can manage its property,[1] raise taxation, which can, however, only be direct or take the form of shop, saloon, tavern, auctioneer or other licences for the purpose of raising a revenue for provincial, local or municipal purposes, borrow money and provide for a civil service. Moreover, three odd powers are given, the control of the solemnization of marriage, the incorporation of companies with provincial objects, and the establishment of hospitals and other institutions other than marine hospitals.

In one matter the provinces have more power than the Dominion for they are, unlike the Dominion, essentially constituent bodies, free to alter everything in their constitution save the office of Lieutenant-Governor, and this the Dominion Parliament seems unable to touch, though the point is not free from obscurity.[2] In the case of education the power of the Dominion to legislate is merely remedial, and it has never been exercised: in immigration and agriculture both legislatures have the power to legislate, but the Dominion Acts prevail. The meaning is clearly that the provinces can pass laws as they have passed laws to facilitate bringing in settlers on special terms, and to promote agriculture, and similar Acts of the Dominion are in force: usually they do not clash: if they do, the Dominion Act prevails.

In the case of the Commonwealth,[3] the enumerated powers

[1] The act divides property between the Dominion and the provinces.

[2] This seems to follow from 30 and 31 Vict. c. 3, s. 91 (29), the right to deal with this office, but this would conflict with the general inability of the Dominion to change its constitution.

[3] 63 and 64 Vict. c. 12, Const. s. 51.

are in great measure the same as those exercised by the Dominion: thus naval and military defence, the postal department, and census and statistics, are assigned to the Commonwealth. Foreign and inter-state trade and commerce are also accorded, and generally currency, coinage, legal tender, banking, other than state banking, so far as it is intra-state, bills of exchange and promissory notes, bankruptcy and insolvency, patents and trade marks, and copyright. Insurance other than intra-state state insurance is added, but this is one of the recognized exercises of the general authority of the Canadian Parliament. The Commonwealth can tax, but must not discriminate between states or parts thereof, and grant bounties on production or export which must be uniform: it can borrow money. Its powers extend to navigation, lighthouses, lightships, beacons and buoys, and to quarantine, but it has only power over fisheries in Australian waters beyond territorial limits, an extra-territorial power of legislation, not granted to Canada. Astronomical and meteorological observations are assigned to the Commonwealth and exercised by Canada. It also controls naturalization and aliens, marriage and divorce, and the people of any race not aboriginal in a State for which special legislation is deemed desirable. Immigration and emigration and the influx of criminals are powers also exercised by Canada. The powers as to external affairs and relations of Australia with the islands of the Pacific correspond only vaguely to the treaty execution power of Canada.[1] Two powers which have been the subjects of much doubt are the control of foreign corporations and trading and financial corporations, formed within the limits of the Commonwealth, and conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State. Other powers are those for the recognition of civil and criminal process issued by the States throughout the Commonwealth, and the recognition of the laws, public acts and judicial proceedings of the States. The Commonwealth may, with the consent of

[1] 30 and 31 Vict. c. 3, s. 132.

a State, acquire a railway in it or build and extend such railways, as it has done in the case of the railway between South and Western Australia. It has, moreover, the right to control transport on any railway for naval and military purposes. It has further the odd power of dealing with old age and invalid pensions, given to it for financial reasons, and it may legislate on any subject if power is delegated by the State Parliaments.

These powers are none of them expressed to be exclusive. But the Parliament is given elsewhere[1] exclusive powers in regard to the transferred departments, namely customs and excise, and such of the following, postal, military and naval, lighthouses, &c., and quarantine as might be taken over by the Commonwealth, the seat of government, and the amendment of the Commonwealth Constitution, with the assent of the people.

In the case of the States, the powers possessed by them on federation remained vested in them,[2] subject to the loss of power to legislate on the matters affecting the transferred departments, and to certain other regulations. Thus they are forbidden to maintain naval or military forces except with the consent of the Parliament of the Commonwealth, or to tax Commonwealth property, while the Commonwealth may not tax State property.[3] They may not coin money or make anything but gold legal tender:[4] they can impose inspection taxes, the proceeds to be paid to the Commonwealth on imports and exports, but these taxes may be annulled by the Commonwealth Parliament if it so desires.[5] The powers of the State are also limited in various ways, as by the requirement that, after the coming into existence of the Commonwealth, a citizen resident in any one State of the Commonwealth shall not be subject to any disabilities on another State, which would not be equally applicable to him if he were resident in that State,[6] and that there must be freedom of inter-state commerce.[7] Moreover, a state must

[1] 63 and 64 Vict. c. 12, Const. s. 52. [2] Ibid., ss. 106, 107.
[3] Ibid., s. 114. [4] Ibid., s. 115. [5] Ibid., s. 112.
[6] Ibid., s. 117. [7] Ibid., s. 92.

make provision to receive in its prisons persons who are accused or convicted of offences against the laws of the Commonwealth, and the Commonwealth is empowered to make laws on this question.[1] The Commonwealth, on the other hand, may not legislate as to religion, or give preference to any State or part thereof, or obstruct the right of a State to use rivers for irrigation or conservation.[1]

In the interpretation of the two Constitutions the essential difference of treatment has been based on the fact that the Privy Council have treated the Constitution of the Dominion as an ordinary Imperial Act, subject to the normal rules of construction, and therefore intended to be given the fullest effect in each clause that is contained in the Act. If such an interpretation should result in producing inadmissible results the Committee has felt that the error can be altered by Parliament, but in point of fact the interpretation which they have adopted has not yet led to the appearance of any insoluble anomaly. On the other hand, the High Court of the Commonwealth has treated the Constitution as a document which cannot be altered save by the very cumbrous process of the referendum, and they have applied to it the principles which have been adopted in the interpretation of the Constitution of the United States. It must, indeed, be admitted, that this mode of interpretation no doubt expresses well enough the interpretation which the founders of federation desired to place on their Constitution, for they were admirers of the Constitution of the United States, and lived too remote from the civil war and from the experience of the actual working of the Constitution of the States to realize its grave imperfections. Moreover, they probably ignored the fact that the Constitution could be easily amended if it were really desired by any real majority of the people to amend it, and that the process in the United States is far more difficult, not merely by reason of the inevitable complication resulting from the large number of states, but still more from the high majority of states required for a constitutional amendment. Nor in the case of a Constitu-

[1] 63 and 64 Vict. c. 12, Const. s. 120. [2] Ibid., ss. 116, 99, and 100.

tion conferred by Act of Parliament can the possibility of an amendment by the same power be ignored, though the Commonwealth High Court doubtless holds the view that further Imperial interference with the Constitution must not be invoked.[1]

The fundamental difference of the results which can be arrived at from the adoption of these two points of view can be seen from the case of the taxation by the local Governments and Parliaments of the salaries of federal officers. In the view of the Judicial Committee the matter was simple enough: it was merely necessary to look at the express words of the Commonwealth Constitution. There was an express declaration that the powers of the States remained inherent in them unless they were expressly given to the Commonwealth: the power to tax remained unaltered, and it must extend to the taxation of the salary of Commonwealth officials.[2] But the High Court took precisely the opposite view. In the early days of the history of the United States, when the feeling between the States and the Central Government ran high, the question was raised whether the State of Maryland[3] was entitled to levy a tax on the salary of a federal officer. Now in these times there was no doubt the obvious possibility that, in order to annoy the Federation and intimidate its officers, the State might tax the salaries of the latter so highly that the officers would be hampered in the execution of their duties. There being no obvious way of restraining the activities of the States in this regard save by a Judicial decision, the Supreme Court of the United States produced the doctrine of the immunity of instrumentalities, which asserts that the instruments necessary for the carrying out of the functions of federation may not be subjected to control by the local Governments: or more simply, that a State cannot tax the salary of a Federal

[1] Mr. Hughes suggested recourse to the Imperial Parliament in 1914 to recall the late Parliament of the Commonwealth; *Round Table*, 1914–15, p. 211.

[2] *Webb* v. *Outtrim*, [1907] A.C. 81.

[3] *McCulloch* v. *Maryland*, 4 Wheat. 316.

officer, for instance, by making him give a stamped receipt for his income,[1] or charging him income tax along with other citizens.[2] Nor would the High Court yield in its view of the law, even to the opinion of the Privy Council, while the Government, in order to support the Court, rescinded by legislation the prohibition on taxation of official salaries, but by another Act removed from the Privy Council the chance of deciding on any of these questions between the States and the Commonwealth, save by the permission of the High Court. There was an obvious flaw in the action of the Government and Parliament, but one denied by the High Court :[3] if the result of the immunity of instrumentalities were part of the constitution, it could not be removed, it must follow, by legislation by the Commonwealth Parliament. To complete the story, it must be added that the Supreme Court of Canada,[4] when the question which had formerly been decided in Canada in the same sense as in Australia, under the influence of the decisions of the Supreme Court of the United States, came before it, followed the reasoning of the Judicial Committee in the Commonwealth case, and declared the taxation to be perfectly legal.

Some of the problems which the Judicial Committee have had to face in the case of the Dominion, could hardly arise in the Commonwealth : thus the long contested point in the Dominion as to whether the Lieutenant-Governors of the Provinces could in any way be said to represent the Crown, which was definitely settled in the case of *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*[5] in favour of their being such representatives for provincial purposes, so that the Crown right of priority of payment over other creditors enured to the Provincial Government, could not arise in the Commonwealth, where the States clearly remain directly connected with the Crown and not, as in Canada, shut off from immediate access to it.

[1] *D'Emden* v. *Pedder*, 1 C.L.R. 91.
[2] *Deakin* v. *Webb*, 1 C.L.R. 585.
[3] *Chaplin* v. *Commissioner of Taxes for South Australia*, 12 C.L.R. 375.
[4] *Abbott* v. *City of St. John*, 40 S.C.R. 597. [5] [1892] A.C. 437.

The presence of the words exclusive in the powers enumerated in the *British North America Act*, ss. 91 and 92, as belonging to the Federation and to the provinces respectively, furnished the chief basis for the argument disposed of in *Smiles* v. *Belford*,[1] that the Parliament of the United Kingdom had purported to divest itself of any legislative power in Canada, and had authorized therefore the Parliament of the Dominion to repeal Imperial Acts applying to Canada, to which Canadian legislation would otherwise be repugnant: the vague power given to the Commonwealth Parliament, to exercise with the consent of the State Parliaments any power which, prior to Federation, could only be exercised by the Imperial Parliament or the Federal Council of Australasia, remains uninterpreted by the High Court. The maxim that any of the legislatures of the Federations can delegate powers, as they are not subject to the rule *delegatus non potest delegare*, established in the case of *Hodge* v. *The Queen*,[2] is definitely accepted by the Commonwealth for its Parliament.[3]

But in other matters the Privy Council has followed a different path from the High Court. It has acted on the principle of reconciliation of the conflicting provisions of the constitution, by endeavouring to give them all a reasonable sense, and to allow the fullest measure of validity to the Acts of both the central and the local legislatures, overriding the local legislatures or the central legislature only when it is impossible to avoid doing so. On the other hand, the High Court has, on the American model, developed the doctrine that many of the powers apparently assigned to the Commonwealth are only to be exercised in such a way that they shall not encroach upon the reserved powers of the States, and everything is reserved which is not expressly given to the Commonwealth, or which is not definitely ancillary to the execution of the powers of the Commonwealth. In some degree the distinction may be held to be based on the fact that the residual power of legislation, in the case of the

[1] 23 Gr. 590; 1 O.A.R. 436. [2] 9 App. Cas. 117.
[3] *Baxter* v. *Ah Way*, 8 C.L.R. 626.

Commonwealth, belongs to the States, but it is doubtful if this affords by any means an adequate explanation of the distinction of treatment

Thus the Privy Council have laid down that in respect of its power of dealing with such subject as bankruptcy, copyright, and patents the Federation may deal with matters of property and civil rights in the provinces, though in one sense these are exclusive powers of the provincial legislature. Thus the Dominion may regulate the conditions affecting warehouse receipts, taken as security by banks, under its power to regulate banking,[1] though the legislation is inconsistent with an Ontario law regarding the form of such receipts. The trade and commerce power of the Dominion, on the other hand, does not exclude the power of the provinces to regulate the trading of insurance companies within the province, intended to secure the adoption of standard forms of policy for fire insurance business. Though the Dominion has power to deal with bankruptcy, and in the exercise of that power might deal with voluntary assignments for the benefit of creditors, unless and until it has done so, it was decided in *Attorney-General of Ontario* v. *Attorney-General of Canada*,[2] it is open for the Ontario Legislature to enact a law on the subject of such assignments as a matter affecting property and civil rights in the province. Both the Dominion and the provinces may seek to regulate the liquor trade, the Dominion under its residual power, and so far as it is impossible to reconcile the provisions of the two sets of legislation the Dominion Act must prevail, but not otherwise is the local legislation invalid, as has been settled in *Russell* v. *The Queen*,[3] and *Attorney-General for Ontario* v. *Attorney-General for the Dominion*.[4] In the case of conflict in the laws of the two powers, then if part of one law is valid and part invalid, the valid part can be enforced if it is separable from the invalid part, so that its enforcement would not make the elimination something quite different from what was intended. The Privy Council held in the

[1] *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31.

[2] [1894] A.C. 189. [3] 7 App. Cas. 829. [4] [1896] A.C. 348.

case of the older Dominion Liquor Licence Acts[1] of 1883-4, which sought to deal with the liquor trade in a way generally beyond the power of the Dominion, that the clauses regarding adulteration of drink might have been upheld had they been separable, but that as they stood the whole Act must fall to the ground. In its liquor legislation, however, the Dominion, as it can act only under its residual power, is restricted to legislation to the peace, order, and good government of Canada: thus, while in the case of its specific powers, it has been decided in *Quirt* v. *The Queen*[2] that the Dominion may pass an Act under its power regarding bankruptcy for the winding up of the bank of one province only, or otherwise legislate for a portion of the Dominion as it thinks fit, in the case of the residual power it would be difficult as a rule to uphold legislation for one province only, unless the circumstances were such as made legislation there necessary for peace, order, and good government in a special sense.[3]

The doctrine of the immunity of instrumentalities was raised on behalf of the Dominion in the case of *Bank of Toronto* v. *Lambe*,[4] where it was argued that, if the provinces were able to impose any taxation which they liked on banks incorporated by the Dominion, they could in effect prevent the exercise of the Dominion power to incorporate banks. The Privy Council overruled this argument, and with it the doctrine of the immunity of instrumentalities. So also provincial Acts may require brewers and distillers, though duly licensed by the Dominion, to take out and pay for provincial licences also. What applies to Canada also applies in the Privy Council view to the Commonwealth, but the High Court has always held the contrary view.

The Privy Council has also refused to accept the view that the Dominion cannot legislate because it interferes with the powers of the provinces. Thus it was contended, in the

[1] 4 Cartwright, 342, n.

[2] 19 S.C.R. 510.

[3] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348.

[4] 12 App. Cas. 575.

course of the discussions[1] on the legislative authority of th
Dominions and the provinces in the matter of liquor, tha
the Dominion legislation was invalid as it, though merel
passed under its residual power, would interfere with th
power of the province which was exclusive to raise revenu
by means of taxation in the form of saloon licences. Thi
view was rejected by the Privy Council: the power to rais
money in this way was exclusive, but, unless the Dominio
attempted to exercise a forbidden power, it was not possibl
to restrict the exercise of its actual powers on the groun
that the sphere of operations of the provincial legislatur
would thus be diminished or otherwise adversely affecte
But the principle affecting the use of the residual power
that it ought to be restricted in its operation to matte
which are Canadian in interest and importance, and that
should not deal, except incidentally and unavoidably, as
the case of the liquor questions, with any of the exclusiv
powers given to the provinces, since otherwise the exclusiv
authority of the provinces would disappear. An instance
the distinction, which would make a matter Dominion a
opposed to provincial, is that suggested by the Privy Cou
cil: the sale of revolvers to young persons in a provinc
might well be forbidden by the province: the arms traffi
as a whole might require for international purposes Dominio
control.

A complicated series of questions arising out of the diffe
ence of the authority of the Dominion under its enumerate
powers and its residual power, and the vagueness of th
power as to trade and commerce, concerns itself with th
position of companies. It is clear law that a company fo
Dominion purposes can be incorporated by the Dominio
Parliament, and that its status as a company cannot b
denied by the courts of the provinces or affected by th
legislation of the provinces.[2] But its power to act in defian

[1] *Russell* v. *Reg.*, 7 App. Cas. 829, at pp. 837 9.

[2] *The John Deere Plow Co.* v. *Wharton*, [1915] A.C. 330. If the power
incorporate falls under the trade and commerce power it is clear that tha
power does not extend to regulating in all its details the action of a company

of provincial laws depends on whether the powers it has are under the enumerated authorities or under the residual power, and this involves the decision whether trade and commerce covers company legislation, and, if so, to what extent it goes. If it did in its whole ambit, then all companies incorporated by Canada would seem to be above all provincial law, but it is clear that the Judicial Committee do not favour this view of trade and commerce and indeed give it no very definite sense, save as certainly including commercial regulation for treaty purposes or something similar. Hence, while a telephone company[1] authorized by the Dominion Government to make telephones cannot be hampered by a law of the province that the consent of the municipality is necessary before it can exercise its powers of erecting telephones in its limits, while the Dominion Parliament for the purposes of Dominion railway may dispose even of provincial Crown lands,[2] and a provincial legislature cannot give a company an exclusive right to operate in the province to the exclusion of a Dominion company on matters not inconsistent with the Dominion legislation the province retains its powers, and can compel the Canadian Pacific Railway Co. to clean a ditch alongside the railway line,[4] but not to fence the line.[5] If the company is only created under the residual power it is practically subject in all respects to the provincial law, provided that that law does not deny its status as a company or seek to compel it to become a provincial company, and that is the case even if the company restricts operations to one province alone,

but merely as to its incorporation and status. The view of the court in *Citizen Insurance Co.* v. *Parsons*, 7 App. Cas. 97, at pp. 116-17, gave incorporation as a general power. The later judgement seems to tend to the other view, but to arrive at the same result.

[1] *City of Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52.

[2] *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.*, [1906] A.C. 204.

[3] *La Compagnie hydraulique de Saint-François* v. *Continental Heat and Light Co.*, [1909] A.C. 194.

[4] *C.P.R. Co.* v. *Corporation of Notre-Dame de Bonsecours*, [1899] A.C. 367.

[5] *Madden* v. *Nelson and Fort Sheppard Railway*, [1899] A.C. 626.

On the other hand, the powers of the provinces to enact legislation regarding companies and the validity of the *Insurance Act* of Canada of 1910, which seeks generally to regulate insurance in the Dominion other than mere intra-state insurance, has been the subject of the most elaborate and unconcluded debate.[1] The question arose whether the provincial purposes for which the province can alone incorporate companies must mean mere business in the province, or whether a company incorporated had the right to avail itself of the comity of other provinces and foreign countries, and to make contracts inside or outside the province in respect of business in the provinces or foreign countries. Moreover, the question also arose whether the objects and functions of a provincial company could be increased by the legislation of the Dominion or other provinces, so that it could carry on business outside the province, or was this entirely outside the meaning of the Imperial Act? The Supreme Court, on being asked to advise under the power of the Government to obtain advisory judgements, which though questioned on the ground that it was invalid and *ultra vires* has been upheld by the Privy Council,[2] gave conflicting opinions.

The question of railway legislation has also raised difficulties: the Dominion in its *Railway Act* claimed the power to impose Dominion legislation on the subject of through traffic on provincial railways, which had never come otherwise under the legislative control of the Dominion Parliament. The claim was, however, rejected by the Privy Council,[3] who denied that the proposal could be upheld whether under the residual power or the trade and commerce power of the Parliament, or on the ground that it was necessarily incidental to the power to control Dominion railways. There was available in the case of a recalcitrant provincial railway the power of the provincial legislature to cause it to meet the views of the Federal railway and the Dominion Government, and in the worst case the Dominion could

[1] See *Journ. Soc. Comp. Leg.* xiv. 357-68. [2] [1912] A.C. 571.
[3] *City of Montreal* v. *Montreal Street Railway*, [1912] A.C. 333.

subject the provincial railway to Federal control by declaring it to be a work for the advantage of Canada.

The fishery rights of the provinces have been a subject of consideration, and it is now clear law [1] that in the open sea the sole power to regulate the right of public fishery within the limits of Canadian jurisdiction is vested in the Dominion Parliament under its power to legislate as to the fisheries: the same rule applies to the estuaries and tidal portions of rivers. Further, the sole right of regulating the modes of fishery belongs everywhere to the Dominion. On the other hand, the Dominion has no proprietary right in the fisheries in non-tidal waters at all, unless, as in the case of the railway belt in British Columbia, the lands have been transferred to the Dominion by the province in virtue of some arrangement. Otherwise the sole right to regulate the fishery, whether by the grant of leases or licences, as a matter of mere property, rests with the province in its right to regulate civil rights in the province, whether the property right rests with the province or is in the hands of private owners.

The marriage question is notorious because of the great amount of excitement which it produced in the Dominion. It was held by the court of Quebec in one case that the effect of the document known as the *Ne temere* decree was to render invalid a marriage contracted between two Catholics by a Protestant minister otherwise than in accordance with the rule that such marriages must be contracted before the priest of the parish of the contractors of the marriage.[2] The decision was, it seems, bad law,[3] but in the meantime, before it was so declared to be, an agitation arose in the Dominion Parliament with a view to the enactment of a law which was intended to have the effect that if a marriage were solemnized before persons having a limited authority to solemnize marriages under the provincial law

[1] *Attorney-General for the Dominion* v. *Attorneys-General for the Provinces*, [1898] A.C. 700; *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1912] A.C. 153.

[2] See J. S. Ewart, *Kingdom Papers*, i. 121–32.

[3] Q.R.J. 41 C.S. 249.

the marriage would be valid in all cases—that is, if a priest having authority only to marry certain persons on grounds of religious faith should marry others, still the marriage would stand good. The government referred the Bill for an advisory judgement to the Supreme Court; it was held to be *ultra vires*, a decision approved by the Judicial Committee, which adopted the view that the power to regulate the solemnization of marriage given by the constitution to the province exclusively was a power under which the forms of celebration could be regulated by the provinces, and such regulation was not open to be overridden by the legislation of the Dominion.[1] It should, however, be noted that the power given to the province is restricted to the province: it is not in the power of the province to regulate the provisions to be observed by people who go outside the province to be married elsewhere: if any further legislation is required on this subject, which now is regulated by the rules of private international law under the aegis of the Judicial Committee, it would seem to fall under the Dominion power of legislation as to marriage. The Dominion power to regulate divorce is a dead letter, as the French Canadian population would not acquiesce in its use, so that each divorce has to be performed by Act of Parliament save in the provinces of New Brunswick, Nova Scotia, and British Columbia, where divorces still can be given under the Acts as they stood before federation, but where no change of law is now possible by local legislation. In Prince Edward Island the power to grant divorce has been disused for a century.

The restriction of the legislative authority of the provinces to direct taxation has led to the strict limitation of the rights of the provinces to raise succession duties, with the result that the law is completely confused. The provinces, however, instead of accepting loyally the restrictions on their powers of taxation and agreeing on some definition which would provide that they did not transgress into fields of taxation open to other provinces or to the Dominion

[1] [1912] A.C. 880.

spend their energies in spreading as widely as possible the net of their taxing Acts. Thus the Ontario Legislature, in its taxation of insurance companies' premiums, as amended in 1914, demands a tax based on the amount of gross premiums received in respect of business transacted in Ontario, and includes as such premiums any premiums paid in the province, and premiums paid anywhere in respect of persons or property in the province at the time of payment. It is clear that in this, as in the Succession Duty Acts, double taxation is a constant incidence of the peculiar method of procedure.[1]

The question of the position of the Indians and their land claims has elicited the decision that the legislative power of the Dominions in respect to Indians leaves the property in the lands occupied by them in the hands of the province, so that if the Indian claims are satisfied the beneficial ownership of the land reverts free of any control or claim by the Dominion to the province:[2] indeed so much is that so that the Dominion cannot claim the sums expended on the removal of the Indians' claims unless a specific agreement to pay has been entered into: there is no known principle of law which allows the Dominion to set out that such payments were in effect paid by it as an agent for the province.[3] The nature of the title of the Indian is held never to have been, since the British occupation of Canada and the royal proclamation of 1763 which promised the Indians that their lands would be reserved to them, more than a usufructuary use and claim on the consideration of the Crown, whence it has been deduced that in law the annuities arranged to be paid to the Ojibeway Indians under the Cession Treaty of 1850 by which they resigned their claims to considerable areas of land in the Lake Huron and Lake Superior districts is merely a contractual right and not a real burden in the form of a trust or interest on the lands, in the sense that the revenues should be

[1] Cf. Sir J. Aikins, *Journ. Soc. Comp. Leg.* xv. 279.

[2] *St. Catherine's Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46. *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637.

applied to the payment or augmentation of the annuities.[1] It has also been held that escheats[2] and precious minerals[3] are included in the property of the provinces, being royalties which with lands, mines, minerals, belong under s. 109 to the provinces. The possession of these lands, &c., is not however, given by the arrangements for the erection of new provinces, and the Acts enforcing these terms, to the new provinces of Manitoba, Alberta, and Saskatchewan, whence has arisen the steady agitation of these provinces to have the lands conceded to their care. In British Columbia while the lands as a whole are retained by the province large grants have been made to the Dominion for public purposes in connexion with the building of the trans-continental railway, and the exact powers of the province and Dominion over these lands and the water rights affecting them have been dealt with by the courts.[4]

The administration of justice enables the provinces to impose, it would seem, duties on Dominion officers,[5] and it is clear that the Dominion can impose the duty of dealing with contested elections for the Federal Parliament on the provincial courts.[6] The control of the criminal law is federal, and the passing of a Lord's Day Observance Act is therefore *ultra vires* a province,[7] but the provinces have power to create and do create a quasi criminal law by imposing fines and imprisonment for breaches of their enactments, and it is no answer to such fines and imprisonment that the act is also a crime under the Canadian law.

The powers of the provinces in regard to municipalit

[1] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A.C. 199.

[2] *Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767.

[3] *Attorney-General of British Columbia* v. *Attorney General of Can* 14 App. Cas. 295.

[4] The matter has been adjusted by the Dominion conceding power law to the province (1912, c. 47).

[5] *In re County Courts of British Columbia*, 21 S.C.R. 446.

[6] *Valin* v. *Langlois*, 5 App. Cas. 115.

[7] *Attorney-General for Ontario* v. *Attorney-General for the Dom* [1896] A.C. 348, at pp. 363, 364.

depend entirely on the constitution and have no relation to the powers of municipalities before the union. The power is to establish civic bodies and to confer on them such portions of authority as can be given under the enumerated powers of the provinces. The right to tax possessed by the municipalities is based on the provincial powers which are delegated to it, for it is fixed law that a province can tax one part of the province and not another as it sees fit.[1]

It is doubtless curious that with the establishment of a federal constitution there should have been no provision for a local court inserted in the constitution other than the mere power of Parliament to establish a court. The power to establish a court has been argued to be the only power which the Parliament should have in this matter, and this was one of the grounds of objection to the practice of asking the Supreme Court for advisory judgements in matters of law regarding the constitutional powers of the Dominion and the provinces. Such an opinion would not bind the court itself in a concrete case and was not therefore a judicial opinion at all. The Supreme Court [2] and the Privy Council,[3] however, both agreed that the power, which had certain analogies in the British constitution, could not be said to be non-judicial, though it should be used most carefully, and though it was perhaps necessary in some cases for the judges to explain to the Government that the questions could not be answered. In point of fact, however, most important questions have more or less satisfactorily been thus dealt with by the court and on appeal by the Privy Council, and it is far from likely that any decision on such hypothetical cases would be varied in a real case. Moreover, in any real case it is nearly impossible to arrive at the real elements of the problem, since the courts must often decide on minor issues, and it seems as if the new procedure, which has become extremely frequent of late, will be permanent: the references on the fishery and the marriage laws have, as

[1] *Dow* v. *Black*, 6 P.C. 272. [2] 43 S.C.R. 536.
[3] [1912] A.C. 571.

decided, given much satisfaction, and the tangle of company legislation seems to need some clearing up in this way.

The practice of bringing all constitutional questions on appeal from the Supreme Court to the Privy Council in one sense certainly weakens the authority of the Supreme Court. At the same time it exempts it from the very trying position of the High Court of the Commonwealth, which sits in the midst of the governments whose position its judgements affect. It would be idle to deny that there have been signs of dissatisfaction with that court. The original body consisted of three justices set up by the Act of 1903, which provided for the number of the court, though the main outline of its powers was laid down in the constitution, contrary to the Canadian practice. In 1905 two more justices were added, and conflict of opinion arose between the two new men, who represented the modern school of Australian thought with a labour leaning, and the three older justices who were fathers of federation and admirers of the constitution of the United States. The result was that in a series of cases the judgements of Sir S. Griffith, Sir E. Barton, and Mr. O'Connor were opposed by the judgements of Messrs. Isaacs and Higgins, the former insisting on the doctrines of the immunity of instrumentalities and the reserved powers of the States, the latter preferring to read the Commonwealth powers in the normal manner applicable to Imperial Acts as authorizing the Commonwealth to legislate, independently of considerations of the powers of the States, in the matters prescribed. Ultimately in 1912 the Labour Government, which was very indignant with the Chief Justice, legislated to add two new justices to the court, and to provide that no constitutional decision should be valid unless a majority of all the justices, i.e. four concurred in the judgement. The Act was severely criticized as an effort[1] to alter the rulings of the court by the intro-

[1] Its validity was also called in question on the ground that Parliament could not legislate as to majorities necessary or rules as to how, in case of equality, the decision was to go, but these objections seem to have been ineffective.

duction of new men, and the appointment of one of the new judges, Mr. Piddington, was so badly received that he resigned office, being succeeded by Mr. Rich. A further change in the court has been caused by the death of Mr. O'Connor, who was succeeded by Mr. Gavan Duffy, the bearer of a well-known name in Australia. The other judge appointed under the new Act was the Commonwealth solicitor, Mr. Powers. Whatever the expectation of the Government as to the effect of the change, and it is idle to suppose that the Government did not wish an alteration of view in the court, the result has not been in any marked way to modify the opinion of the court on any topics presented to it. Perhaps too much faith was placed by the Government in passing the measure on the dicta of the two judges appointed in 1905, that they felt themselves at liberty to disregard in future majority decisions of the High Court if they thought them wrong, which was interpreted in some quarters to be an indication that they would, if they were supported by colleagues, reverse older rulings. The adoption of such a policy would have been a blunder: the proper way to upset the decisions of the High Court is clearly merely by constitutional alteration.

The view of the Commonwealth Constitution taken by the High Court emphasizes the independent position of the states as retaining in all matters not occupied effectively by the Commonwealth their sovereignty: it has even been doubted if the Commonwealth has power to enact a law regarding fugitive offenders or extradition. This question raises the difficult point to what extent the Commonwealth is a central legislature within the meaning of the *Interpretation Act*, 1889, so as to exercise, in reference to the States, the powers given by Imperial Acts to such legislatures as opposed to local legislatures. The answer must clearly be that the Commonwealth Parliament is not a central legislature in any matter in which it has no legislative power: therefore the Governor of a State is still the Vice-Admiral of the Commonwealth[1] and not the Governor-General, a fact

[1] 53 and 54 Vict. c. 27. s. 10.

admitted by the Commonwealth Government at the begin
ning of the war, when the State Governors as well as th
Governor-General issued proclamations of the outbreak o
war so as to bring into operation the working of the priz
courts in the States as required under the *Prize Court Act*.
The State Governor again is not subject to *mandamu*
under any Commonwealth Act[2] since that would be
violation of State sovereignty. But the Commonwealth i
not a mere agent of the States for any purpose:[3] even i
the States have a share in the customs revenue, and th
surplus over Commonwealth requirements is to be pai
to the States, the Commonwealth Parliament alone mus
decide what is the expenditure which it will incur. No
is the Commonwealth Parliament in the slightest wa
fettered in deputing to the Governor-General in Counci
powers of subordinate legislative authority.

The powers of the Parliament in the opinion of the cour
depend in the first place on the meaning of the terms use
in conferring them, and on this ground they have considere
very carefully the power of dealing with immigration, an
have decided that a person who is definitely connecte
with Australia in some way, such as birth therein or fixe
abode, cannot be treated as an immigrant,[4] though mer
artificial domicile under the law that an infant, who ha
never been in Australia, has the domicile of his father is no
a good reason to permit his immigration. They have als
held that a workers' trade-mark which is a mark to show
that the article was manufactured under trade unio
conditions is not a subject of Commonwealth power at all
as no such trade-mark is included in the meaning of th
terms of the constitution giving the power.[5] But in addition
even if the power is given by the mere words it cannot b

[1] 57 and 58 Vict. c. 39, s. 2 (2).

[2] *The King* v. *Governor-General of South Australia*, 4 C.L.R. 1497.

[3] *State of New South Wales* v. *The Commonwealth*, 7 C.L.R. 179. Th
replies to such assertions as that in *Parl. Pap.*, Cd. 3340, p. 24.

[4] *Potter* v. *Minahan*, 7 C.L.R. 277.

[5] *Attorney-General for New South Wales* v. *Brewery Employés' Uni*
New South Wales, 6 C.L.R. 469.

supported if it offends the doctrines of the immunity of instrumentalities or the reserved powers of the States.

The immunity of instrumentalities was first, as we have seen, applied by the High Court to the simple case of a receipt stamp for a federal salary, which was denied validity; it was also applied to the salaries of the federal officers, commencing a dispute which only ended in 1907; it was also cited as preventing the municipality of Sydney levying taxation on the property of the Commonwealth.[1] But if used against the States it soon appeared that it could be used for them: it was relied upon by the High Court to forbid the application of the Commonwealth legislation to railway servants who were employed by a State Government.[2] But they declined to extend this doctrine to protect the State in importing barbed wire for the use of farmers,[3] or even from it to draw the less unnatural conclusion that the State was entitled to import duty free the rails needed on the Government railways of the State.[4]

The doctrine of reserved powers was first asserted by the High Court in *Peterswald* v. *Bartley*,[5] where the power of the States to impose licence duties on the manufacturers of beer was expressly asserted, and the general doctrine enunciated that the constitution contained no provisions for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States or to restrict the power of the States to regulate the carrying on of any business or trade within their boundaries, or even, if they think fit, to prohibit them altogether. Otherwise the effect of the constitution would be to deprive the States of the power to regulate their internal affairs in connexion with nearly all trades and businesses carried on in the States. To construe the constitution thus was to run

[1] *Municipal Council of Sydney* v. *The Commonwealth*, 1 C.L.R. 208.
[2] *Railway Servants' Case*, 4 C.L.R. 488.
[3] *The King* v. *Sutton*, 5 C.L.R. 789.
[4] *Attorney-General of New South Wales* v. *Collector of Customs of New South Wales*, 5 C.L.R. 818.
[5] 1 C.L.R. 497.

counter to its whole spirit. The same doctrine was appli
by the three first justices of the court in the famous case
the excise on agricultural machinery,[1] in which the Commo
wealth Parliament, in an effort to carry out by its pow
the new protection, i.e. a protective policy in which t
workers should have their assured share of the increas
price produced by protection, laid it down by Act No.
of 1906 that an excise duty should be paid on agricultu
instruments, provided that it would not be levied if certa
conditions of the remuneration of labour were compli
with. They held that in substance this was not a va
exercise of the power of imposing excise duties, but
attempt to regulate the conditions of labour in the Stat
which was *ultra vires*: the new justices disagreed, holdi
that, as long as the power was given to tax, the motive w
immaterial. The same divergence of opinion marked t
discussion of the question of the validity of Part VII of t
Commonwealth *Trade Marks Act*, 1905,[2] which provid
for the marking of goods by a mark indicating that t
goods had been made under union conditions. The majori
of the court dismissed the idea that such a mark was a tra
mark at all, and they held that, treating the matter sole
as an exercise of the commerce and trade power, the sectio
of the Act in question were void as an attempt to regula
the trade of the States *qua* internal, which was express
forbidden, since the power of the Commonwealth w
restricted to inter-state and foreign trade. The same pri
ciple was again applied to limit the power of the Comm
wealth as to corporations,[3] the majority of the court decidi
that the power to deal with them was confined to prohibit
their engaging in trade or to imposing conditions on th
being permitted to do so, but not to imposing rules on th
affecting their conduct of operations if they were allow

[1] *The King* v. *Barger*, 6 C.L.R. 41.

[2] *Attorney-General for New South Wales* v. *Brewery Employés' U*
of New South Wales, 6 C.L.R. 469

[3] *Huddart Parker and Company Proprietary Limited* v. *Moore*
8 C.L.R. 330.

to engage in trade: it was not open to subject them to special laws as regards monopolies or conditions of wages or anything else of the kind, all these being powers of the States alone.

The same principle has been used to limit very severely the value of the power of the Commonwealth to legislate for conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State. The High Court decided[1] that the power thus given did not allow the court to prescribe in the settlement of any dispute the payment of wages which were at variance with the wages fixed by Wages Boards in States acting under statutory authority to fix minimum rates, though they allowed the court to override awards of State arbitration courts and industrial agreements which were legal and effective under State law. They, however, qualified seriously the effect of this rule by allowing the court to give a higher rate of wages than the minimum fixed by a State Wages Board, on the ground that as the parties could agree to fix a rate higher than the minimum the court had equal power in this regard.[2] But they definitely declined,[3] and in this all the justices for once agreed, to admit that the court could impose a common rule regulating any trade as to which it had intervened to settle or prevent a dispute. The court pointed out that the giving of this power was not necessary as part of a scheme of arbitration or conciliation: it dealt with cases where no dispute had arisen or even threatened, and it was in effect legislation by the Court of Conciliation and Arbitration; no such power of legislation had been conferred on the Commonwealth Parliament itself, and it could not indirectly do what it had no direct power to do, even if the lack of this power were likely, as pointed out by Higgins J., to render

[1] *The Woodworkers' Case*, 8 C.L.R. 465.

[2] *Australian Boot Trade Employés Federation* v. *Whybrow and Co.*, 10 C.L.R. 266.

[3] *Australian Boot Trade Employés Federation* v. *Whybrow and Co.*, 11 C.L.R. 311.

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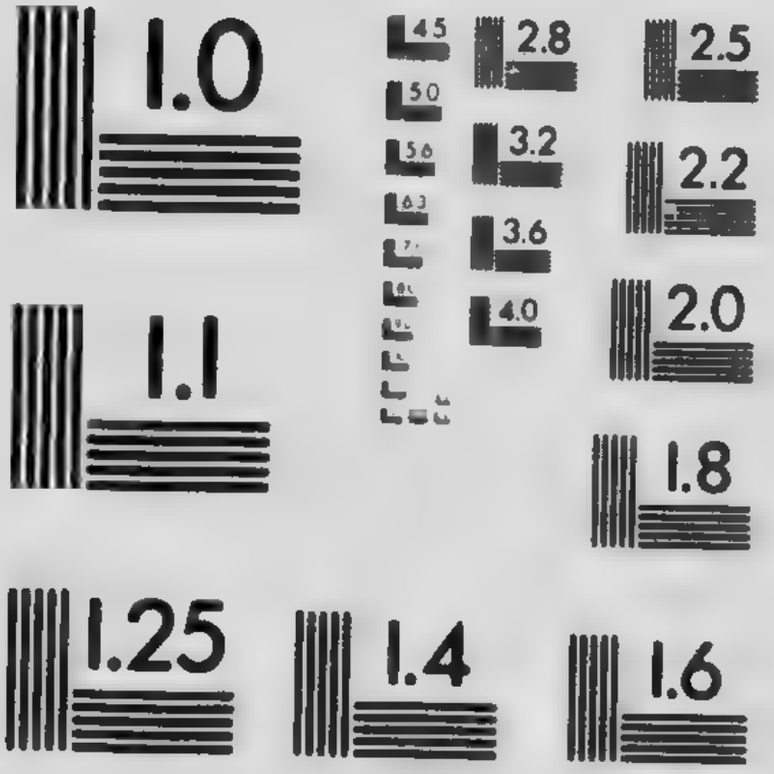

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the powers of the Court of Conciliation of which he wa
President somewhat inadequate. Further difficulty ha
arisen from the fact that the question what is a disput
extending beyond the limits of a State raises so man
nice points of law as to render any discussion or decisio
very difficult. It is not wonderful therefore that effort
to exclude the High Court from interfering by prohibitio
with the powers of the Court of Conciliation were made b
the Parliament of the Commonwealth, but the effort was
failure, the court being prepared to hold, apart from specif
provisions of the constitution and of the *Judiciary Ac*
that the nature of federal jurisdiction gave the High Cou
the right to control by prohibition any improper exercis
of it.[1]

The doctrine also was applied in 1910 to the case
merchant shipping, when it was decided that the Commo
wealth power was confined to inter-state shipping and t
foreign shipping, and not to intra-state shipping at all
A *Seamen's Compensation Act* was therefore held *ultra vir*
because it did not make the necessary distinction, and th
whole Act had to fall with the invalid part, since it wa
impossible to hold that Parliament would have consente
to distinguish the two classes of cases.

More serious, however, than even these instances wa
the decision of the Judicial Committee of the Privy Counc
in the matter of the *Royal Commissions Act*, 1912. Th
question arose out of the desire of the Commonwealt
Government to ascertain the real position in trade of tha
great monopoly, the Colonial Sugar Refining Company
New South Wales, which carries on business in Fiji an
New Zealand. In order to obtain the information desire
after some trouble with the Company in 1911, the Commo
wealth by Act No. 4 of 1912 gave extensive powers to Roya
Commissions to compel the appearance of witnesses an
the production of documents. After the passing of th
Act the Royal Commission summoned the manager of th
Company, requiring him to attend and to produce certai

[1] 11 C.L.R. 1. [2] *SS. Kalibia* v. *Wilson*, 11 C.L.R. 689.

books and documents. He replied[1] by bringing an action for a declaration of the invalidity of the *Royal Commissions Act*, and an injunction to restrain the Commission from proceeding on the summons, or alternatively, if the court should decide that the Act was not invalid, a declaration that the manager was not bound to answer questions nor to produce books or documents relating to matters as to which the Federal Parliament had no legislative powers, or which were not relevant to the subject-matter of the Royal Commission on the sugar industry. Stress was laid by the plaintiff on the famous decision on the validity of Form IV in the case of *Dyson* v. *The Attorney-General*.[1] The case was heard by four justices, and the validity of the Act was upheld. The Chief Justice said that the power must be deemed to refer to matters falling within the ambit of federal power, and that therefore the Act itself could not be held to be invalid, but he considered that many questions to be asked were not relevant to the powers of the Commonwealth, which did not extend to interference with the internal or domestic management of the affairs of corporations trading under State laws. Nor was an inquisition into the operations of the Company outside the Commonwealth within the ambit of federal power, save in so far as it related to the conditions of carrying on the sugar industry in the abstract. He considered therefore that the Commissioners should be restrained from requiring the manager to answer any questions or produce any documents which were relevant only to the internal management of the affairs of the Company, the operations of the Company outside the Commonwealth except in so far as they related to the conditions of carrying on the sugar industry irrespective of the persons by whom it was carried on, matters relating to the value of particular parts of the property of the Company, except such parts as were actually used in the production and manufacture of sugar in the Commonwealth, and details of salaries paid to officers of the plaintiff Company, except in so far as they were relevant

[1] 18 Argus L.R. 429.

[2] [1911] 1 K.B. 410; [1912] 1 Ch. 158.

to the actual cost of such manufacture and production The opinion of the Chief Justice was shared by Barton J. but Isaacs J. and Higgins J. in varying degrees dissented In view of this dissent the High Court certified that the case was one which might properly go to the Judicial Committee The result of that journey was startling.[1] The Judicial Committee examined the basis of the constitution of the Commonwealth, and laid much stress on the fact that the Canadian constitution was based on a very different principle from that of the Commonwealth constitution, in that it transferred the residual power to the Dominion, whereas the tenth amendment of the American constitution expressly reserved that power to the States of the Union. The Commonwealth constitution therefore gave the Commonwealth only such powers as were transferred, as was plain from the express words of ss. 51 and 107 of that constitution. Now the power of imposing restrictions on the liberty of the subject by causing him to answer inquiries was one which did not appear to have been transferred to the Commonwealth: that Parliament had power to deal with various subjects, and in connexion with them it might impose obligations to give information, but the *Royal Commissions Act* dealt quite generally, and gave the coercive powers it mentioned to all statutory or common law commissions, nor indeed had specific Acts been passed giving the directions to give information for which inquiries might have been directed. The inquiries might be urged, as by Higgins J., to be relevant to the possibility of altering the constitution either under s. 128 of the constitution or by the exercise of the vague power in s. 51 (xxxviii) empowering the Parliament to exercise, with the concurrence of the States concerned, any power which at the time of the establishment of the constitution could only be exercised by the Imperial Parliament. But, until the constitution had been altered, it was impossible for the Commonwealth to justify its legislation imposing the duty to answer such inquiries

[1] *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* [1914] A.C. 237. Printed in the Commonwealth *Parl Pap.*, 1914 ,No. 2

which was a power not given, and therefore not exercisable. Nor could the Act be supported as incidental to the exercise of powers actually existing by statute or common law. No such powers had been actually set in operation, and the *Royal Commissions Act* must be held to be invalid, without an alteration of the constitution, though the Committee had hesitated to give this decision in view of the contrary opinion of the Chief Justice and Sir E. Barton.

As against this crushing demolition of the *Royal Commissions Act* there can only be set the fact that the High Court of the Commonwealth declined to apply the doctrine of reserved powers to the *Land Tax Act*, 1910, of the Commonwealth.[1] It was pressed on the court that the Act was really meant for the purpose of breaking up large estates, and was not a taxing Act at all, but the court had no difficulty in distinguishing between the fact that an Act was really intended for one purpose and merely nominally carrying out a power, and the probable effect of a genuine taxation Act. The boundary line in any individual case may, of course, be slight, but the general soundness of the distinction seems beyond cavil.

Another point of much dispute has been the prohibition of the imposition of taxation by the State on Commonwealth property or *vice versa*.[2] The difficulty came to a head in the case of the importation of steel rails for the use of the New South Wales Government railways, when the New South Wales Government took the law into its own hands and took the goods away from the custody of the federal authorities, refusing to pay duties. The High Court decided that the duties were levied not on property but on the importation, but this seems rather a forced view, and it is perhaps safer to say that property in the section of the constitution in question was not intended to refer to imported goods at the time of importation.

The question of non-discrimination between residents of

[1] *Osborne* v. *The Commonwealth*, 12 C.L.R. 322.

[2] *Attorney-General of New South Wales* v. *Collector of Customs of New South Wales*, 5 C.L.R. 818.

different parts of the Commonwealth is not an easy on
The ruling has, however, been laid down that an Act bas
on domicile does not offend against the prohibition
differential treatment, so that it is not a contravention
the rule if a State raises succession duties in a differe
way in the case of succession of domiciled persons a
other cases.[1] On the other hand, it was held that the sectio
had no application unless a person residing in one Sta
seeks to enforce rights in another: it could not apply
the case of a man who was resident in the State whic
legislated.[2]

More generally important is a decision under s. 92, whic
provides for freedom of intercourse and trade among th
States. The question was discussed at some length i
a case, *The King* v. *Smithers, ex parte Benson*,[3] which wa
decided at the end of 1912. The point at issue wa
whether the provisions of a New South Wales Act to prever
the influx of criminals were valid, inasmuch as they pro
hibited the entrance into the State of any person sentence
in another State for a crime, the punishment of which wa
death or imprisonment for a year or upwards. The cas
was brought on a writ *nisi* for *certiorari* to remove th
conviction of one Benson in New South Wales into th
High Court. All four justices who heard the case agree
that the conviction was bad. The Chief Justice did no
rest his view on either s. 92 or on s. 117, but on the genera
principle, which arose from the mere nature of federation
This principle proved that the power of police was limite
to cases of necessity for self-defence, which did not exis
in such a case, and Barton J. concurred. Isaacs an
Higgins JJ. rested their agreement with the view that th
conviction was bad expressly on s. 92, which they held a
a warning to both the Commonwealth and the States that
there were to be no boundaries for intercourse or trade
S. 92 has also been invoked in *Fox* v. *Robbins*[4] to show

[1] *Davies and Jones* v. *State of Western Australia*, 2 C.L.R. 29.
[2] *Lee Fay* v. *Vincent*, 7 C.L.R. 389.
[3] 16 C.L.R. 99.
[4] 8 C.L.R. 115.

that it is impossible for a statute to impose higher duties for licences to sell the wine produced in another State than the sum charged for a licence to sell local wine only, an interesting decision since otherwise a State might by licences, which it can legally impose, practically give a preference to its own products over those of another State, a result clearly opposed to the principles affecting a federal constitution. On the other hand, in 1915, an effort to make the principle apply to prevent a State Government exercising its sovereign power of expropriation of goods was defeated by the judgement of the High Court,[1] which also by a majority of four judges to two pronounced the judicial power conferred on the Interstate Commission by the Commonwealth Act constituting it to be *ultra vires* as an attempt to confer judicial authority in a quarter beyond the High Court.

It is by no means unnatural in view of these many restrictions on the Commonwealth powers that successive Commonwealth Governments should have aimed at the securing of greater powers for the Commonwealth Parliament. It is the obvious result of the creation of any political body that it should seek to enlarge in every way the ambit of its authority, and the Government and the people of the Commonwealth seem to have steadily been approaching nearer the period when the constitution will have to be largely altered in important respects. The first formal effort to change the powers of the Commonwealth was made by Parliament in 1910,[2] when two proposed laws were duly passed, and referred to the people, but failed in 1911[3] to obtain acceptance in five out of the six States, though the Government still enjoyed popularity in the country. The extraordinary position then arose that, though the Government's proposals were emphatically rejected, the Government were not affected politically in any direct manner by the result of the voting. In 1912 the proposals

[1] Melbourne *Argus*, March 24, 1915; above Part I, chap. xv, § 3.
[2] *Parl. Pap.*, Cd. 5582, pp. 29, 30, 42.
[3] *Parl. Pap.*, Cd. 6091, p. 68.

were again passed by Parliament, but this time as six laws, which have been summarized above.[1] In this case also the referendum was held simultaneously with the federal elections, and the result was curious.[2] The Commonwealth Government were defeated by one vote in the Lower House, but three States, South and Western Australia and Queensland, approved the referenda, and the majorities against them were nowhere at all very serious. The determination of the Government to proceed with them in the session of 1915, after their return to power, was only to be expected, and the appeals made to prevent the spread of party feeling by pressing these proposals were somewhat belated,[3] as the Government in its over-confidence had pressed on the general election, when it might have avoided the result by agreement with the Opposition, which had offered frank and full co-operation. However, it must be remembered from the point of view of the Government that they had asked in 1914 for their referenda again to be submitted to the people at the time of the general election, and that this request had been refused. To expect them therefore to forgo the chance of success in the repetition of the referenda could hardly be expected. Moreover, an additional reason for having a referendum was afforded by the proposal to change the law of Parliament to secure the concomitance of the election for Senators and the Lower House in 1918. This cannot be done under the existing constitutional powers of the Commonwealth, and had therefore to be sanctioned or denied by the people, unless the alternative of an Imperial Act were faced, and it is the desire of all parties in the Commonwealth as a rule to avoid such an application.

The most attractive counter-proposal which has been made in the matter is undoubtedly one which was put forward by Mr. Holman as a solution of the difficulty. He was anxious to see that the Commonwealth secured

[1] *Parl. Pap.*, Cd. 6863, pp. 108, 109; above, Part I, chap. v.

[2] *Parl. Pap.*, Cd. 7507, p. 60.

[3] *Round Table*, 1914–15, pp. 209 seq. For the other side see P. M. Glynn, *Federal Constitution*.

for the purpose of conciliation and arbitration definite wider powers, while the States would retain the general control of their internal affairs. He recognized that the confusion arising from the existing state of things, seven different systems, all acting at the same time, was disastrous, and, as it appeared to him useless to ask the Commonwealth to restrict its powers either by Act or by constitutional change, he thought it would be wisest to transfer to the Commonwealth all the power to deal with trade disputes by conciliation and arbitration, abolishing seven conflicting sets of rules, and securing at the same time in all probability more smooth working. If the matter were in Commonwealth hands it would still work by local, if federal, courts, and these courts would be just as likely to consider local conditions carefully as any existing courts, while as they were federal courts there would be less temptation on the part of the Commonwealth Court to interfere with its local branches. Such a solution, however, would clearly not go far enough for the Labour Party at large, and, whereas in 1911 the referenda of the day were frankly opposed by many Labour men in New South Wales, in 1913 the recalcitrants had come in the main into line, a fact which explains in part the much more favourable appearance of the voting for the referenda, though that was in part due to the fact that the referenda coincided with a general election.

A fairly comprehensive scheme of arrangement was also suggested by Mr. Holman at the conference of State Premiers held in 1912,[1] when it was proposed to resolve that the several Parliaments should pass laws transferring to the Commonwealth legislative power with regard to labour and employment so far as necessary to enable the Commonwealth to prevent and settle industrial disputes extending beyond the limits of any one State, and to provide that certain conditions of employment considered suitable by an authority constituted under the law of the Common-

[1] For Mr. Holman's proposals see *Parl. Pap.*, Cd. 6091, p. 73; the above represents the degree of agreement arrived at, but New South Wales and Western Australia dissented from the proposals as inadequate.

wealth should be a common rule of the industry, and shou
override the local rules *pro tanto*. The Commonwealth w
also to have power over monopolies and combinations
extending beyond a single State, and declared to be
restraint of trade or commerce to the detriment of t
public by the High Court, so that the Commonweal
might acquire the business on just terms or carry it o
or acquire property used in connexion with the busines
the subject of the combination or monopoly. Further,
order to prevent unfair competition, it was proposed to s
up a procedure under which the Commonwealth Court
Conciliation and Arbitration would have power to lay dow
regulations as to conditions of employment in any trad
if complaint were made by a State court, on the motio
of a State industrial tribunal, that an industry in th
State was suffering from unfair competition as a result
the industrial laws of another State.

These proposals are interesting, not because of the
completeness, but because they show that the feeling tha
the provisions of the constitution are not by any mea
satisfactory is generally recognized in the Commonwealt
The Commonwealth Government, in the arguments
1912 in Parliament over the passing of the Bills for th
referenda, laid stress on the fact that the law of Australi
was inadequate to deal with monopolies or combines, as ha
been proved in the failure of the proceedings in the cas
against the steamer owners and the coalowners who mad
an agreement to raise the price of coal to the detriment
consumers,[1] by the proceedings in the case of the Colonia
Sugar Refining Company, which made the people of Australi
pay £7 7*s*. 2*d*. more for their sugar than they charged th
people of New Zealand, and paid 10 per cent. annually
and by the experience of the Government in trying to buy
steel rails for the transcontinental railway, thanks to th
opposition of the steel trust. The Opposition argued, i
reply, that the same result could be attained by co-opera
tion of the States and the Commonwealth, and that it wa

[1] The coal vend case; Commonwealth *Parl. Pap.*, 1914, No. 22.

desirable not to seek uniformity overmuch, but to encourage individuality by allowing each State to preserve a vigorous personality instead of reducing the position of the States to a nominal power alone.

The Opposition also pointed out that there were several matters in which change of constitution seemed more necessary than in regard to the legislative authority of the Parliament, including especially the position of the Senate. That body, which was appointed to be in theory the representative of the interests of the States as against the Lower House based on population, can hardly be said to have shown much activity in this regard, though here and there on an odd point, such as the building of a quarantine station in Tasmania, the local Senators secure by their unity the rejection of a proposal. Normally, however, the result of the system of election of the Senators has been to throw the power into the hands of the best organized party—the Labour Party. Each State forms one electorate for the election of the three Senators whose office falls vacant every three years, the term of a Senator's office being six years. There is no preferential voting, and, as a State is an enormous area, an individual cannot possibly canvass it in any way. Therefore, the party which has its candidates and its electors best in hand has the great advantage of being able to send its three candidates out to the different parts of the State, and thus to cover the ground more or less effectively. A party with less excellent organization falls short in this important point.

The inaccuracy of the present system as a means of representing the parties of the country can be best seen by the figures of the election of 1913: the result for the Lower House, single member constituencies without preferential voting, was that thirty-eight members of the Opposition were elected, and thirty-seven of the Government.[1] The proportional figures on gross numbers would perhaps have been thirty-nine to thirty-six in favour of the Government: at any rate, the Government was fairly

[1] *Parl. Pap.*, Cd. 7507, p. 59; Keith, *Journ. Soc. Comp. Leg.* xiii. 526–41.

well matched in every way with the Opposition, and
a good many votes because of the referenda, which w
voted on at the same time and defeated. On the ot
hand, while the referenda agreed with the actual re
of a small success to the Opposition by giving the pa
against an advantage of about 25,000 on a vote of nearly
millions, the Senate saw the return of eleven Governm
members to seven Opposition. By good organization
Opposition won all the seats in New South Wales
Tasmania, and one in Victoria, but none elsewhere. Cle
New South Wales should have returned one Labour mem
at least, if the representation of the State were to repres
in any way the people: the same thing applies to Tasma
while on the other hand Victoria, which would but for
intervention of an independent candidate have sent th
Opposition candidates back, gave but one to the Oppositi
In all the other three cases the Opposition should ha
had one member apiece, and the result should have be
nine to nine. The position is, however, even worse than
seems, for at the election of 1910 the whole eighteen pla
of Senators were secured by Labour, while undoubtedly
any reasonable system of voting the Opposition should ha
had at least six seats, so that in a House of thirty-six o
two election results they would have numbered fifte
votes, in place of a negligible seven. In the general electi
of 1914, out of thirty-six places contested they won
five, one by an accident, though they had about 48
cent. of the voting strength.[1] It is certain, therefore, th
the present plan is open to the criticism that it tends
the undue swelling of majorities, and that it makes
decision of an election depend on electoral organizati
and wire-pulling to an exaggerated degree. But the chan
of any change is scarcely to be called worthy of consider
tion. The Lower House could, indeed, if it felt able, for
the reference to the people of a change in the mode of sele
ing Senators, but the difficulty of carrying in the teeth

[1] In the Lower House the Labour Party, with 52 per cent. of the vot
won under 57 per cent. of the representation.

Labour a measure which would attack them in their favourite stronghold can hardly be exaggerated.

Curiously enough, by the side of the regular organization of the Commonwealth there has grown up a new feature of the life of Australia, the holding of periodic conferences among the Premiers and other ministers of the States in which problems affecting the States are discussed with the Commonwealth ministers or among the State Premiers, according to the nature of the subject-matter of the discussion. The flourishing character of these conferences is rather interesting, since at first sight at least it seems odd that it should be found desirable or necessary to continue meetings which before federation were the only effective means of co-operation between the States, but which after federation might seem to have sunk into unimportance. But this result has not been attained, by reason in part of the independent position still occupied by the States, and by reason also of the fact that the Commonwealth and the States are placed by the agitation for the referenda in a position which is sometimes almost one of antagonism. The States, moreover, in the early days of the Commonwealth especially, were desirous of discussing among themselves many of the financial questions affecting them and the Commonwealth, such as the long-vexed problem of how to settle the finance of the Commonwealth and States, which finally was disposed of by the adoption of the payment of twenty-five shillings *per capita*, in place of the old and inconvenient three-quarters of the net customs and excise revenue, thus compelling the Commonwealth to raise three times more money than any sum required by her for expenditure from this source. On few of these occasions has much important business been done, but that of March 1914 was noteworthy for its tone of hearty friendship between Commonwealth and States, a fact due to the presence in office of the brief-lived Liberal Government of Mr. Cook. The nature of the work done at these conferences is indicated by the discussions which then took place: the problem of the use of the waters of the Murray

River was to be solved by an elaborate scheme benefiti
South Australia, Victoria, and New South Wales alik
the Commonwealth rendering the plan of constructi
a huge system of weirs and locks practicable by beari
half the cost, while Australia would win half a milli
irrigated acres. It was also agreed to settle one of t
chief disputes between the states and the Commonweal
by giving up the separate post office banking busine
transacted by the Commonwealth Savings Bank,[1] and allo
ing the States to enjoy this popular mode of securi
money cheaply, while in return the States were to trans
their banking accounts to the Commonwealth Bank, a
thus give it the strength which it required. But wh
these two projects, neither of which has matured, we
instances of the possibility of co-operation, the conferen
left the old question of the position of the conversion
the railway gauge in practically the old *impasse*. by mer
agreeing that the Interstate Commission should be ask
to consider the possibilities of conversion : the error ma
through colonial jealousy in the early years of the found
tion of Australia has left Victoria and South Austra
with 5′ 3″ gauge lines, and New South Wales with 4′ 8
while the Commonwealth has commenced its east to w
line to join Kalgoorlie with Port Augusta, on the N
South Wales gauge. The necessity of a uniform gauge
military defence would seem to be obvious ; the funds
carry it out are lacking.

But though, like many other forms of conference, t
conferences of State Premiers are not necessarily ve
fruitful[2] in results, and though sometimes the discussi
seem to lead to no end, the value of the conferences is
to be underestimated, and the formal conference of M
1915 at Sydney, when Mr. Fisher attended to repres
the Commonwealth, and every State was represented, sho
that the change of Government in the Commonwea

[1] Cf. Mr. Fisher's proposals in 1912 ; *Parl. Pap.*, Cd. 6091, p. 72.

[2] A Conference in August 1914 to agree on a policy as to food prices
conservation was not very effective ; see *Round Table*, 1915, pp. 677 s

means no serious change of co-operation between the States and the Commonwealth. It is characteristic that the relations of the States and the Commonwealth do not by any means necessarily become closer through the similarity of political faith between the parties in the Commonwealth and the States. The Labour Ministry of New South Wales in particular has shown signs of sharing the general dislike of seeing the engrossment of all authority by the Commonwealth, and it is only through the pressure of the Labour organization outside Parliament, under the leadership of Mr. Watson, the first Labour Premier of the Commonwealth, that the State Labour Party has been more or less effectively brought into line.

The advantages of encouraging co-operation with the States have recently revealed themselves in an unexpected manner. The result of the general election of September 1914, which was rashly provoked by the Government, was their complete and effective overthrow by the loss of four seats in the case of New South Wales and two in the case of Victoria, and the new Government were therefore under a clear duty to proceed with their policy, provided it was not inconsistent with the action requisite for the purpose of ending the war, so far as that lay in the power of the Commonwealth. The Opposition tendered to the Government the fullest measure of co-operation in all matters pertaining to the war, and even went beyond the Government in urging, with the *Bulletin*, that compulsion should be employed if necessary to secure adequate men for the aid of the mother country; this view was also adopted by the Labour Government of South Australia which had come into office in 1915 as the result of the defeat of the Ministry of Mr. Peake at the general election of that year. The Government, on the other hand, were extremely anxious to carry out anything necessary in the interests of the Empire, but they thought that they were clearly entitled to proceed also with the six referenda which had been rejected on May 31, 1913, but which they claimed would confer on the Commonwealth powers which it was absolutely

essential that it should possess in time of war, and th
proposed to add a seventh so that at the next gene
election for the Lower House the election should correspo
with that of the Senators whose places would then
vacated. The position, therefore, threatened to degener
into a case in which the Commonwealth would be distrac
with a referendum just at the time when its whole energ
should be concentrated on the successful carrying on of
preparations for war, and the feeling throughout the coun
was strongly against disunion, though the Labour Pa
observed that this could be avoided by the simple expedi
of the Opposition conceding the principle that the referen
should be accepted, in which case the actual voting wo
cause no friction or difficulty. Fortunately at almost
last moment it was found possible amicably to arran
the issue by the agreement of the States—which, howev
has not been approved by the Parliaments in five of th
—to pass legislation conferring on the Commonwea
Parliament for the period of the war and for the te
of one year thereafter the powers considered essent
by the Commonwealth, though not the full powers wh
the Commonwealth wished to have, but rather those wh
were advocated in 1912 by the Premier of New South Wal

From both the federations the Union differs essentia
because it is really, as its name proclaims it, a union. Th
seemed to be at first sight no place in the British Dominio
where every circumstance made more for mere federati
Natal was a very British colony with an enormous nati
population in a barbaric condition and a British Indi
population outnumbering the white population: the Ca
was an old-established British-Dutch colony with a nati
franchise and a record of staid and sober governmen
the two Dutch republics, then British colonies, had ne
been able to agree in their independent existence to fo
a unity, and certainly had so developed on different li
that the idea of any close association seemed out of
question. Nor were the colonies in the slightest deg
affected by mutual affection: the people of each had a ve

modified opinion of the merits of those of the other Colonies, and very special idiosyncrasies, though in each Colony, but least in Natal, there was a certain similarity in the type of the ignorant farming Boer. On the other hand, the most active and pushing men of the Dutch race were to be found in the Transvaal, while the most ignorant were also there in the out-of-the-way parts, and the Orange Free State contained the most conservative of the Dutch.

The causes which compelled union in place of a real federation were economic pure and simple. The movement to federation became possible with responsible government, and not only did it become possible but it became necessary. As long as the Imperial Government controlled the fate of the Transvaal, the Colony could not take any step which was disagreeable to its neighbours, but its hands were untied at once when it was given liberty to guide its own course, and General Botha showed at an early date the decision of his Government to carry the day in South Africa. The Cape would naturally have expected to be the leading party in any discussion, but the Cape was economically unable to rival the Transvaal. If the Transvaal could not be satisfied, it could cease to let the Cape or Natal have any of its goods traffic, and the long lines of railway, built at great cost to convey the produce of the Rand to the coast and to carry back in return food stuffs and mining machinery and material, would lose the best part of the traffic, and the economic ruin of the Colonies was as good as certain. Moreover, the miners of the Transvaal were clamouring for cheaper imports and objecting to the protective policy of the Cape, which was binding on the Transvaal while it was still bound by the Customs Union, and the Transvaal Government had only to threaten to refuse any renewal of that agreement to show the coast Colonies their danger, in view of the tempting nearness of Delagoa Bay and the fact that the Government of Mozambique and the Transvaal were on terms of marked intimacy.

But, while the aim of the Transvaal was bent on the closer union of all South Africa, it was for long the view that

there should merely be a federation, and it was argue conclusively in favour of this view that the essential diffe ences between the Colonies were exactly those which cause federation and not union to be inevitable. The Coloni had common interests, but differed greatly, and therefo should be allowed to be unhampered in individual growt subject to the existence of a union to represent all Sou Africa and to deal with questions of common intere It had been pointed out by Lord Selborne in the meme andum[1] as to the position of South African affairs which wrote at the request of the Government of the Transva that the union of the Colonies of South Africa would great promote independence of the Imperial authority, which w quite impossible as long as the different Colonies disagre among themselves and one or othe- appealed to the Imper Government to use its influence in respect of the poli of another Colony. But when the attempt to frame constitution was made, the federal solution was felt to impossible, so many and important were the things which united action was required, and so comparativ few those matters on which the provinces could engage separate action. This was due in large measure to nature of the country. To take an obvious instance, cat disease and other agricultural troubles could not be allow to be dealt with on four different systems without gr danger to the different Colon.s, and therefore agricult must be capable of being controlled by the central gove ment. The railways must be run on one principle through traffic facilitated, and so the railways, which Australia are state controlled and in Canada are larg privately owned under Dominion control, but in So Africa are nearly all state owned, had to be managed one central body. Needless to say, customs and defe must be national, with the post office and statistics, navi tion and all that pertains thereto. Moreover, there must a uniform native policy: that had been decided from beginning of things as essential in any federal scheme,

[1] *Parl. Pap.*, Cd. 3564.

the Native Affairs Commission of 1903–5, on which were representatives of all the Colonies as well as of Rhodesia and Basutoland, had reported in a sense which showed that the management of such affairs was far too chaotic and confused by reason of the different policies of the four Colonies.[1]

There remained, therefore, nothing but union as a practicable course, and the decision to set up provincial councils and provincial administrations was only in the first place an effort to meet the natural difficulty which would have arisen, had the apparatus of government at once been removed from the four capitals to one only, and had no places been left for local politicians. In the second place, it is certain that local government is important in the case of South Africa, and it is appreciated, and therefore the setting up of the councils was an effort to encourage an active spirit of local interest in affairs. But the essential features of the whole constitution are that it is a unitary one and not a federation in any real degree.

This fact is sufficiently shown by the powers of the federal Parliament which are quite inconsistent with those of the Union Parliament. The latter has the power to abolish the provinces and to alter their constitution as it thinks fit, subject only to the nominal requirement of reservation of any Bill so abolishing the Provincial Councils or abridging their powers. In the second place, the laws of the provinces have validity even when within the ambit of their powers, only so far as they do not conflict with a law of the Union, and the Parliament of the Union has unfettered power to legislate on every topic which the Provincial Council can deal with, though it may be granted that the Union Parliament should as a matter of courtesy refrain from gratuitously occupying the field left to the provinces. But that field is again subject to many limitations, part of which are in the hands of the Government of the Union. A provincial council may legislate as to roads, ponts, outspans, and bridges, but not as to bridges connecting two provinces,

[1] *Parl. Pap.*, Cd. 2399.

as to markets and pounds, fish and game preservatio
hospitals and charitable institutions, municipal council
divisional councils and other similar local institution
elementary education for a period of five years and ther
after until Parliament otherwise decides, and direct taxatio
within the province for the purpose of raising a revenu
for provincial purposes. But to raise money it mu
conform with directions laid down by Parliament a
obtain the sanction of the Governor-General in Counci
agriculture is in its province only so far as Parliame
thinks fit: local works and undertakings are subject to
only if not ports and railways, and any work may
declared a national work by Parliament and constructe
by its authority by agreement with the Provincial Coun
or otherwise. The Council may also deal with any matte
which the Governor-General in Council considers of mere
local or private nature and with any subjects sent to it
Parliament. It can also impose fine or imprisonment
a breach of laws made within the ambit of its power.[1]

Moreover, when the Provincial Council has passed a B
it must receive the assent of the Governor-General
Council, and this assent is only given if the Union Gover
ment think that it ought to be given, acting on its o
discretion.[2] The short period since the origin of the Gove
ment of the Union shows that there is not the slight
prospect of any undue readiness to yield to provinc
wishes in these matters.

Further, the control of the executive government of
province is largely in the hands of the Union Governme
The executive administration of provincial affairs in matt
over which the province has legislative power is entrus
to an executive committee consisting of four perso
whether members of the Council or non-members, elec
by its members by means of the transferable vote on
principle of proportional representation, and they are joi
with the Administrator of the province, a Union offi
who has a vote in their deliberations and also a casting v

[1] 9 Edw. VII, c. 9, s. 85. [2] Ibid., s. 90.

Further, his importance is increased by the fact that he can act for the Union Government in matters not within the power of the Council, if authorized to do so, and in so acting is not bound to consult the committee at all. The members of the committee need not even be members of the Provincial Council, and they hold their offices from general election to general election independently of the views of the Council, so that there is no responsible government in the management of the affairs of the province, though there is of course some approach to it in that the members are elective, and are not permanent. Moreover, the further control of the Administrator is secured in that he must recommend any appropriation of money for governmental purposes, and all monies can only be issued on his warrant, after such appropriation,[1] and the accounts of the province are audited by an Auditor-General, appointed by the Governor-General in Council and removable by the same authority.

At first the whole expenditure of the provinces was subject to the approval of the Governor-General, and the revenue was paid by the Government from appropriations made by Parliament, the only fixed amount being that for education, other than higher education, when the sum paid was based on the appropriations of the colonial Parliaments for that purpose in 1908. By Act No. 10 of 1913[2] the financial relations of the provinces to the Union are regulated up to April 1, 1917, in accordance with the consideration given to the question by a commission appointed by the Union under the terms of the Act of Union. The province is given a subsidy from the Union, certain revenues are transferred to it, and others are assigned, and it is empowered to raise additional revenues in certain ways. The subsidy is to be half the normal expenditure of the province, including in that sum expenditure by divisional councils, school boards, and native councils out of sums raised locally, but, if in any year after March 31, 1914, the normal expenditure exceeds that of the year before by more than $7\frac{1}{2}$ per cent.,

[1] Except in special cases under s. 17 of Act No. 10 of 1913.

[2] *Parl. Pap.*, Cd. 7507, pp. 85–90.

only a third of the excess will be allowed in providing for th expenditure for the next year. The expenditure of th province is to be classed as normal and non-recurrent, th former including all expenditure on administration generally the cost of carrying out the matters entrusted to th province where it does not fall under the head capit expenditure, interest and sinking fund payments in respec of advances made to meet capital expenditure, and the co of construction and maintenance of roads, unless the co of construction but not of maintenance is allowed by th Treasury to be treated as capital expenditure. Capit expenditure covers expenditure on the erection or improv ment of any building, bridge, or any permanent work undertaking, provided that the expenditure on a buildi must exceed £500, and that on a bridge or other wo £1,500. The provinces of Natal and the Orange Free Stat receive also additional subsidies of £100,000 a year. Th subsidies are to be estimated by the Administrator and t be paid in the financial year to which they apply, bu readjustments are to be made subsequently. The subsidi may be readjusted if the province ceases to be expected t deal with any matter at present entrusted to it. Fo capital expenditure, loans are to be made by Parliament interest not over 5 per cent. to be repaid by equal hal yearly instalments within forty years.

The province receives also the revenues derived fro certain fees, dues, and licences including hospital fe education fees in respect of elementary education, totalizat fees, auction dues, game licences, certain dog licences, tra licences, and other miscellaneous receipts. The Counci may legislate as to the raising or management of su revenues and may amend the laws of the Union regard to these matters. But a Provincial Council cann make an ordinance relating to licences to trade so as take away any right existing at the commencement the Act to appeal to a court of law against a refus to renew any licences, this provision being intended preserve the appeal given to British-Indians again

refusals of the Natal municipal bodies to renew existing licences.[1]

Provision is also made for the enlargement of the authority of the provinces: if the matter is one which falls under the heads specified in the second schedule to the Act, the Governor-General may with the concurrence of the executive committee determine whether the additional matter shall be so entrusted, while on any other matter an Act of Parliament shall be necessary. When any power is allotted, the Provincial Council may make ordinances in respect of the transferred matters. The matters scheduled include the destruction of noxious weeds and vermin; the registration and control of dogs outside municipal areas; the experimental cultivation of sugar, tea, and vines save as these matters concern the administration of the laws relative to diseases of plants; the making of grants to agricultural and kindred societies not being registered under any law; the administration of libraries, museums, art galleries, herbaria and botanic gardens, excepting the governmental libraries at Capetown and Pretoria; the control of places reserved out of crown lands by the Union Government as public resorts or as of historical or scientific interest; the administration of cemeteries and casual wards; the distribution of poor relief; the regulation of opening and closing of shops and regulation of hours of shop assistants; the administration of the *Labour Colonies Act*, 1909, of the Cape of Good Hope; the establishment and administration of townships; the licensing and control of vehicles and of other means of conveyance using roads under provincial control; the regulation of horse-racing and betting and of totalizators.

In addition to the transferred revenues certain revenues of the Union are after collection to be paid to the provinces, namely those derived under the laws affecting transfers of or successions to immovable property, revenues under laws regarding licences for the sale or supply of intoxicating

[1] See above, pp. 206, 213. The power of a Province to discriminate on colour grounds is denied; *Williams* v. *Johannesburg Municipality*, [1915] T.P.D. 106.

liquor, and in the case of the Transvaal the revenue fro
licences for the employment of natives. These matters sha
remain under the sole legislative control of the Unio
In the case of Natal a special grant is to be made equal t
the amounts derived by the municipal and local authoritie
from trading and liquor licences. The powers of Provincia
Councils as to licences are further limited to a considerabl
extent by forbidding the receipt of revenue or the makin
of ordinances in respect of licences for commercial travellers
companies or banks, or insurance and friendly associations
newspapers, gold dealers, brokers and cutters of precio
stones, for prospecting for metals, manufacturing cigarette
dealing in arms, ammunition or explosives, engagement
recruitment of natives, or the ownership or use of boilers
nor may any province exact licence fees which may b
exacted by any municipal or local authority.

The Act gives also to the Administrator authority to allo
the expenditure of money in cases of emergency despite th
fact that no appropriation has been made, if postponemen
would mean serious injury. The total sum so to be autho
ized shall not exceed £25,000, and the expenditure must b
submitted at the next ensuing Council at latest, to th
Provincial Council for appropriation.

The expectation with which the provinces were set u
has hardly been in the full degree carried out, as it wa
probably thought that they would not be marked by part
feeling to any great extent. The Transvaal, however, ha
proved that the expectation is not exactly justified. Th
deportation of the workers at the beginning of 1914 rouse
much bitterness of feeling and the Provincial Council becam
the scene of strife. The Council determined to enter upo
a course of resistance to the control of the Union Gover
ment, by setting up select committees in place of the executiv
committee of the province as entitled to the powers of a
executive under responsible government, and claiming t
be entitled to fuller powers and to complete freedom in th
use of the powers which they enjoyed. This would hav
meant the reduction of the Administrator, both in h

capacity as head of the administration and in his capacity as the servant of the Government of the Union, to the position of an ordinary Governor or a Lieutenant-Governor in a Canadian province who normally acts on the advice of ministers, and the Union Government could not be expected in any way to agree to a change in the existing relations of the two authorities, even had it been in the legal power of the province to do so, as it was clearly not.[1] Nor will the Union assent to the desire of the Provincial Council that all taxation should be based on land values, though it has allowed the Council to establish various rules for itself on other points.

One of the difficulties in the way of the Union which caused some trouble was the language question: in the Cape there was limited equality of the Dutch and the English languages confined to the use of them both in Parliament, but in Natal there was no such equality at all, and the provisions of the constitutions of the Transvaal and the Orange River Colony gave Dutch privileges, but not full equality. It was, however, decided that the grant of full equality should be accorded, on the ground that only thus could the Union be satisfactorily brought about. It is not easy to accept the view that this concession was desirable: it was absurd in a place like Natal to flood the country with useless duplicates in Dutch which nobody wanted to read, and even in the Cape the practice of printing matter in Dutch had by a commonsense Ministry, whether British or Boer, been restricted to documents which were of some real interest to the Dutch-speaking race. The result of union was not merely to confirm an existing rule: it was definitely to give Dutch a far higher place than it had hitherto occupied, and nothing but the agreement of the South African parties would have rendered the concession a reasonable one. The best excuse for the policy is that the future of English in the Union is assured, since Dutch will never be a language of any literary or political or commercial importance in the world and the speakers of Dutch must perforce learn English. But this is not the ideal of the

[1] See *Round Table*, 1915, pp. 573, 739, 740.

Dutch at all, and the first few years of union were rendere
difficult by the determined efforts of Mr. Hertzog, whos
loyalty to the Empire was found singularly wanting i
1914-15, to force a bilingual system of education upon th
schools throughout the Union. This was brought abou
by a device[1] in which, in return for the Orange Free Stat
modifying its compulsory Dutch teaching, the other pr
vinces went further in admitting the teaching of Dut
than had been done before. The system as finally agree
upon in effect aims at bilingualism, but does not make i
as formerly in the Free State, compulsory. Up to th
fourth standard the child shall be taught in its home la
guage, but the parent may insist on the pupil being gradual
accustomed to be taught also through the medium of t
other language. After the fourth standard both languag
are to be used unless the parent prefers one only, and
either case there must be provision for efficient teaching
separate classes, if the pupils are numerous enough. Mo
over, the other language of the two shall always be taug
in all schools, unless the parent of the pupil objects. T
teachers in future will be expected to pass the highe
examination in both languages when seeking a certificat
the medium of examination is to be chosen by the teach
and he must pass one language on the higher standa
and one at least on the lower. But no English-speaki
or Dutch-speaking teacher in office when the laws in t
various provinces came into force was to be penalized
otherwise competent for his duties, by reason of lack
knowledge of the other language.

In Australia the language question has never appea
in a practical form, though here and there may be fou
villages of German parents who have little knowledge
English. In Canada, on the other hand, French in Que
naturally maintains its position, and it is by law given eq
rights in the Parliaments of the Dominion and of Que
and in the law courts of the Dominion and of Queb

[1] See *Parl. Pap.*, Cd. 6091, pp. 81, 86, 87.

[2] 30 and 31 Vict. c. 3, s. 133.

But in Ontario also[1] there has been of late an increasing effort on the part of the French-speaking section of the people to insist on the practical recognition of the French tongue, though it has no legal rights whatever. The examination of the educational system of the province undertaken by the Government resulted in the realization of the fact that in many schools in the French-speaking districts of the province the use of English was systematically regarded as undesirable and no teaching was taking place in it, or if it was being taught it was taught in such a way as to be of no real value to the pupils. The action of the teachers was clearly to be reprehended: the education system of Ontario is based on instruction through English, with an exception in case of German and French communities where, the home language not being English, the use of English as a medium would at first be absurd, but it is intended that the use of English should be gradually increased, as should obviously be the case in a British Dominion. The Government as the result of the investigation carried out by its commissioner decided that the use of French or German as a medium of instruction and means of communication should not be continued beyond a child's second year of school life, that the instruction of children in English should begin immediately after the entry of a child upon school life, and that additional inspection to secure this result should be provided, while government grants would be confined to schools which had competent English teachers on their staffs. It is characteristic of the feeling created by these subjects that the decision of the Ontario Government was a source of bitter complaint in Quebec and denounced as a deliberate attack on the French element of the population.

The example of Quebec undoubtedly proves that the grant of official encouragement to a foreign language in a British possession has grave disadvantages from the point of view of unity. It is undeniable that until the European War it would have been quite impossible to predict that the

[1] *Parl. Pap.*, Cd. 6091, pp. 65, 66; *Round Table*, 1915, pp. 661-9.

French-Canadians in any substantial numbers would show themselves eager to take part in the wars of the Empire, and of course, even now, when they are fighting with and for France, their response has not been comparable to that of the British. The bond of language is a strong one for purposes of separation, and it is idle to deny that a very large proportion of the French in Quebec neither know nor wish to know any other tongue. Real fellow feeling in other matters is thus impossible, as is indicated by the fact that the division between the Irish Catholics and the French Catholics in Canada is extremely marked. The case is of course far worse with the masses of Galicians, Ruthenians, or other similar peoples whom the foolish immigration policy of the Dominion of Canada has allowed to be settled on its western lands. These communities are often determined not to be educated: they ignore the ordinary laws of society and their presence in Canada will steadily make for the introduction there of all the evils of the system of the older civilization in over-crowding, lack of independence of the workers, and so forth.

In the case of the Union alone is there any prospect, or indeed possibility, of further addition of territory on an important scale: that Newfoundland should ultimately become part of Canada is suggested by geographical conditions, and was foreshadowed in the *British North America Act*, 1867. But while the other changes foreseen by that Act have been fulfilled, and all the continent of North America so far as it is British is now under the Dominion of Canada, and the greater part of it assigned by the new legislation of 1912[1] to the existing provinces, leaving to the Dominion under her direct control only the far north, the Island of Newfoundland has remained steadily outside the circle. The temptations to enter the Union would of course have to be mainly financial, and the difficulty is that the Government of the Dominion has not yet been able to see its

[1] *Parl. Pap.*, Cd. 6863, pp. 17, 18; Acts, cc. 40 (Ontario); 45 (Quebec) 32 (Manitoba). The Dominion reserves full control of Indian affairs and lands, and in Manitoba of public lands also.

way to give terms which could be accepted by the Colony. Moreover, prior to 1904 the existence of the French rights in Newfoundland, and the controversies which they excited, led to the reluctance of the Dominion to take upon itself the troubles which would result from having those thorny questions on hand. Nor, until 1910, was the difficulty with the United States disposed of more or less completely. But, while intrigues for the bringing of the Colony into the fold are a regular amusement of the statesmen of the Dominion and the Colony alike, there is no immediate prospect that the fishermen and the merchants will be convinced that a change of political status would benefit them financially, unless the Dominion is prepared to pay dearly for the privilege of including the Colony. The power of appointing Senators from the Newfoundland Ministry of the day and other means of providing remuneration for these ministers might easily result in the readiness of a Ministry to see the change accomplished. Indeed ministers have always been accused, probably with a good deal of truth, of having the possibility of federation before them at all times, but the terms of the Dominion must be improved a good deal before they can be accepted, or in the alternative the Colony must suffer such a set-back as will induce the people to accept much less than they want. The change, however, if and when accomplished, would be of minor consequence from the point of view of the Empire. It is inconceivable that connexion with the Dominion would make the Newfoundlanders less loyal, though it is true that they would lose in status, and also perhaps in other ways not material, from ceasing to be autonomous, and becoming subject to the wirepullers at Ottawa. Moreover, they are far from Ottawa, and it is quite possible that development would merely be retarded by union, for the eyes of Canada are set, and will for some time be set, on the west and on the prairie provinces.

The further question arises in the case of Australia, whether New Zealand and the Commonwealth might not be united to form one powerful Dominion of Australasia. The proposal, however, seems one which can hardly be accepted

by New Zealand without great loss in many respects. Th
Dominion is large enough in area and in potential populatio
to become a powerful country if not a great one, and ho
interest and wants are in many small ways very differen
from those of the Commonwealth. The Central Governmen
of the united dominion must lie in Australia, and the powe
of such a central government effectively to exercise authorit
over New Zealand without much friction seems very doubtfu
But the failure of every effort from 1890 onwards to solv
the problem of including the Dominion in the federation
a distinct proof of the difficulty of carrying federation effe
tively beyond certain limits.

In the case of the Union the possibility of attainin
Rhodesia is one of the aims of the Union Government, an
Rhodesia was allowed to participate in the constitutio
making of the Union. But Rhodesia has shown itse
unwilling to merge its future in that of the Union. Th
position of the country is greatly complicated by the presenc
of the governing and other powers of the British South
Company, by which, under the terms of its chart
October 29, 1889, the administration of the country
carried on, subject to certain changes made by subsequen
legislation. From 1903 onwards there has been the growin
desire of the settlers to secure the freer development of th
country apart from the management of the Company, whic
having commercial as well as administrative functions
fulfil, is regarded by them as incompetent to manage th
two successfully. The Company, on their part, while pr
pared to concede in principle that the administrative powe
of the Company should be brought to an end, have contende
that their rights in the lands of the country and their claim
to be repaid thereby if not otherwise, for all their expendi
ture on the conquest and administration of the country, i
so far as these sums have not been repaid by administrativ
revenue, should be secured to them : the nature of the sum
can be judged from the proposals in 1903–4, which woul
have given the settlers control in exchange for the acceptanc
of liability for a debt of about £7,500,000, of which only

third would be represented by sums to be spent on development, the rest being dead-weight debt. This proposal could not be accepted as the country could not bear such a burden, and the Imperial Government refused to assist, and in 1905 vetoed the proposal to raise a loan of £250,000 for advances to farmers on the security of the administrative revenue. In 1907 the Company adopted the policy of making a distinction between the commercial and administrative aspect of their business transactions, but without any approval from the Imperial Government, while there was steadily growing in the country a determination to question the title of the Company to the control of the land, on the ground that the control of the land was vested in the Company merely as an administrative body, and that it had no proprietary right to the land, so that, if it were deprived of its administrative powers, the proprietary claims it asserted would disappear, and the new administration would have complete control over all land not lawfully alienated or leased. The Company in its turn relied on its conquest of the land plus its concessions from Lobengula, and its occupation to give it a proprietary title. In 1908 and 1909 efforts were made to induce the Imperial Government to settle this dispute, but the Secretary of State declined to intervene, seeing that an effective settlement was only possible if both parties agreed, and the Company declined to agree. But the Imperial Government insisted in 1911[1] on the issue of an Order in Council to carry out the promise of a wider representation of the people of the country by the abolition of the nominee majority in the part elective Legislative Council set up by the Order in Council of 1903, and by the new Order the Legislature was made to consist of five nominee to seven elective members in place of equal numbers of each. In 1912 a movement of some strength apparently developed itself in favour of ultimate union with the Union, but in 1913[2] the Company made a new statement of policy modifying in the

[1] *Parl. Pap.*, Cd. 7264.

[2] Ibid., Cd. 7645, pp. 31–7. For the proposed expenditure for 1913–14 see Cd. 7708.

direction of greater freedom their position of 1907. Th
agreed to increase the Legislature to eight nominee w
twelve elective members, to carry out more completely
separation of administrative and commercial revenue,
taking care that the commercial department paid its obli
tions to the administration in cash and on the same terms
the ordinary public, to transfer all administrative buildi
to the administration without extra cost, and to surren
some additional sources of revenue to the administrati
They announced their intention to favour responsible gove
ment if that were desired, in which case no claim would
made for the initial expenditure of the Company on
acquisition and defence of the country, which the Compa
would put down as the cost of its winning control over
assets in land and mines. They moreover expressed rea
ness to arrange for loans for capital expenditure desired
administrative purposes, and agreed that after October
1914, they would not, if the charter came to an end in
of their administrative privileges, claim under the terms
clause 33 of the charter the value of public works carried
since October 29, 1914, if on the whole period the admi
tration had paid its way and, if it had not, the amo
claimed would only be the actual value or the deficit in
total cost of administration as compared with administ
tive revenue, whichever should be the less. Partly a
result of this, and partly as the result of the growing feel
of distrust of the Union in consequence of Mr. Hertz
anti-British propaganda, the electors at the elections for
reformed Council to which five new elected members w
to be added, refused to return any candidate suspected
leanings towards the merger of Rhodesia in the Union,
the Legislative Council thereupon asked[1] that the exist
form of company government should be continued for
time being, a proposal rendered necessary by the fact
the Crown under the charter had the power to alter
administrative position at twenty-five years from its gra
and thereafter at ten-year intervals, but that there should

[1] *Parl. Pap.*, Cd. 7645, pp. 10, 11.

made arrangements to allow of the introduction of responsible government when the country was fit for such government. It was further asked that the audit of the accounts of the Company should be placed in the hands of an auditor who should not be an ordinary servant of the Company, that loans on the security of the Company's administrative revenue should be allowed, and that any member of the Council should be permitted to propose appropriations after provision had been made for civil service, police, and the maintenance of law and order. The Imperial Government, in consultation with the Company, arranged that there should be issued a supplemental charter,[1] providing that, if the Legislature should resolve by a majority that responsible government should be introduced, this could be done if the Imperial Government thought fit, but that otherwise the charter should not be changed as regards the general principles of administration. They also agreed to the appointment of the Auditor or Auditor-General being made, like those of the judges, one to which the approval of the Secretary of State was necessary, the same approval being requisite for dismissal. The proposal to allow any member of the Legislature to propose appropriation was rejected, on the ground that the responsibility for expenditure must still rest with the Company, which under the Order in Council of 1911 retains the control of all initiative of expenditure and taxation, and without whose consent no legislation affecting their rights can be passed. But the Imperial Government approved of a modified system of raising loans: it rejected the simple expedient of the issue of bonds charged on the administrative revenue, proposed by the Company, but agreed that the Company should advance monies to the administration for the purpose of carrying out works which could not be defrayed from ordinary revenues, the sums to be repaid from such revenue as rapidly as possible, say in twelve years, on the understanding that, if the administration of the Company terminated, the Company would have no right to the repayment of the sums outstanding, but would

[1] *Parl. Pap.*, Cd. 7970. The charter is dated March 13, 1915.

have a right to the cost of the works executed, in so far t
they had not been defrayed from the balance, if any, betwee
administrative revenue and expenditure, an ingenious devi
for securing due economy by both the administration an
the Company.

The land question, which had been of course keen
debated for the whole period, was for the moment dispos
of by being referred to the Judicial Committee of the Priv
Council for its consideration and determination under t
provisions of the *Judicial Committee Act*, 1833. The Co
mittee decided to hear the various interests involved, inclu
ing that of the natives who might have a claim to the lan
by counsel, and the Company undertook to place their ca
on record for discussion.

2. The Possibility of Imperial Federation.

The summary of the chief points in the federations alrea
existing in the Empire will bear out the view that t
creation of federal government is not merely a matter
great difficulty, but that the working of such a governme
adds very considerably to the complication of existence, a
from one point of view retards progress by absorbing in t
legal difficulties which arise much intellect and much effo
In Canada, for instance, there is considerable need for leg
lation as to the pollution of waters of various kinds, but
carrying of such legislation is hampered by the admitted f
that it is very doubtful if the legislative authority to p
such legislation is vested in the Dominion Parliament at
and the theory that changes of law can well be effected
the parallel action of a number of legislatures is one wh
would not be entertained very readily by any person w
has observed the great difficulty experienced in the Uni
States, or in any other federation, in securing any
similarity of legislation by different legislatures. There
the highest authority for saying that the provinces of Can
consistently differ in detail in their legislation on ev
conceivable topic, and these divergencies are very troub

some in business transactions: each province has its own ideas as to company law and of insurance, and if the Dominion had not been the sole authority in matters of patents, trade-marks, and copyrights, it would doubtless have its own laws in respect of these points also. To ask one legislature to follow the precedent of another and to expect it to do so faithfully is futile: it is an essential part of human nature to seek to improve on whatever is put before one, and the tendency to do so is always felt by legislatures: slight improvements are made on the model, involving other changes and spoiling the uniformity, even if the principles of the legislation are adopted.

Moreover, there is always present in a federation beside the constant questions of *ultra vires*, the hampering of the Government, and the weakening of the Legislature and the Executive, the possibility of quite serious disputes between the federation and its members. These disputes are rendered free from real danger to the Empire when they occur merely in one area: in the Dominion or the Commonwealth the mere physical proximity renders the seriousness of disagreement infinitely less than the dangers which would be incurred in the case of disagreement between members of a federation which are separated by the sea. It is more difficult in a single area with facilities for close intercourse between the members of the several political divisions for those feelings of hostility to spring up which make a dispute between the members of federation a real danger to the federation. The danger to Canada from the attitude of British Columbia in the seventies lay precisely in the fact that the Province was not united by railway with the rest of the Dominion, and that it felt that, if the agreement to unite it were not carried out, it would cease in fact, and therefore should cease in law to be part of what was in effect a foreign State. Similarly, had the failure of the Commonwealth to carry out the making of the railway between South Australia and Western Australia been indefinitely prolonged, there might have grown up a dangerous feeling of discontentment in the west: even as it is, there is clear trace of a growth

of different national sentiment in the west, and it is well that the railway will not be long unfinished: the mere needs of defence are in the long run not more important than the fact that national unity in the Commonwealth can never be complete without real possibilities of free intercourse. It is the same cause which makes the people of Newfoundland in many respects essentially distinct from those of Canada they are not in immediate contact with the Dominion, and their outlook is not identical with that of the Dominion. Similarly the great and probably fatal objection to unity between New Zealand and Australia lies in the fact of the distance between them which would render the government of the Dominion by a Federal Government, with its abode somewhere in Australia, obnoxious.

These are very obvious considerations, and they struck powerfully home to the members of the movement for Imperial federation who, in the period from 1880 on, sought to secure some measure of Imperial unity by means of federation. The problem in one aspect was at that time more promising, in that the Australian colonies were still quite separate, and it was not therefore a question of dealing with so strongly formed a national unit as the Commonwealth of Australia. Moreover, at that time the dependence of the colonies on the protection of the Mother Country was more obvious and undeniable: the first assistance of any serious kind, and then only valuable as a token of sentiment, was given in the Sudan expeditions of 1884–5 by Canada and New South Wales, and the policy of naval development had neither been conceived by the colonies nor favoured by the Imperial Government. An offer to give a colony a share in the control of the Empire meant therefore more then than it would now, when in Australia there is a national Government with very wide authority. But the Imperial Government in summoning the first Colonial Conference of 1887, which was an assemblage of notables and not a political body proper, the representation including every part of the Empire, and not merely representatives of Governments in power in the self-governing colonies, as in 1897 and 1902

through the Secretary of State for the Colonies, expressly ruled out the question of federation as a matter for serious consideration. In 1891 the efforts of the movement elicited from Lord Salisbury[1] the express assertion that the organizers should frame a definite scheme, a challenge which they could not meet, and the movement for the time died away. Interest in some degree transferred itself to the preparatory matter of the federation of the Commonwealth, and at the Conferences of 1897, 1902, and 1907, the idea of federation was not mooted: indeed, the first two Conferences showed contentment in the main with the existing arrangements of the Empire.

It was therefore all the more striking when Sir Joseph Ward, the Prime Minister of the Dominion of New Zealand, at the Imperial Conference of 1911[2] introduced the subject of the possibility of the creation of federation for the Empire. The reception of his proposal was rendered difficult and unsatisfactory because of a defect for which he must be held to have been responsible. The resolution which was put forward by New Zealand for consumption by the Conference was not the one which he actually submitted, and indeed differed from it as fundamentally as any two proposals on one subject could well do. The original proposal was that there should be an Imperial Council of State with representatives from all the constituent parts of the Empire, whether self-governing or not, in theory and in practice advisory to the Imperial Government on all questions affecting the interest of the Oversea Dominions. The proposal had resemblance to the views expressed by Mr. Chamberlain in 1897 and 1902, and was in the main line of development of Imperial ideals, but that resolution was never discussed at the Conference, as in place of it Sir Joseph Ward set out a new plan, one for an Imperial Parliament of Defence, by which he meant naval defence only, as alone being common to all parts of the Empire. He proposed that it should be a genuine Parliament elected in such manner as each

[1] Sir C. Tupper, *Recollections of Sixty Years*, pp. 251, 257.

[2] *Parl. Pap.*, Cd. 5745.

Dominion thought fit, as regards the members representin
that Dominion in the Parliament. The basis of represen
tation was to be one member for 200,000 of populatio
which, on the then population of the Dominions and th
mother country, would give the latter 220 members, Canad
37, Australia 25, New Zealand 6, South Africa 7, and New
foundland 2, or just under 300 members. These would co
stitute the Lower House, and there would be an Upper Hou
or Senate, of twelve members, two chosen by each of th
members of the federation to represent them. The execu
tive power corresponding to the legislative power of th
Parliament would be vested in a body of fifteen, of whom no
more than one should be a Senator. The legislative powe
of the Parliament would extend to naval defence and t
treaties, and questions of war and peace, treaties mainly i
their relation to such naval defence. The Parliament woul
have no power to deal with taxation, but it would be entitle
to be provided with funds for the first ten years of its exi
tence by the Dominions, and the Imperial Parliament woul
have a right to decide the amounts to be contributed to th
expenditure to be incurred, on the basis that the Dominion
were to pay *per capita* for defence purposes only half of wha
the people of the United Kingdom paid *per capita*, but wer
to contribute equally on that basis for other purposes. Th
mode of payment after the first ten years would be left t
be decided by the Dominions themselves. As a supplemen
to the scheme the proposal put forward the suggestion th
the Dominions should raise ten shillings a head for nav
defence, giving a revenue of £6,500,000, sufficient to buil
three Dreadnoughts annually, or preferably to pay th
interest on, and provide money to replace the ships purchas
by, a loan to be raised to the amount of £50,000,000, wit
which twenty-five Dreadnoughts could be constructed, an
these vessels would be available for the defence of the over-
Dominions, in effect being a far better mode of protectio
than the local fleets contemplated by Australia and Canada
The scheme he also recommended as being likely to give th
Dominions a real knowledge of, and voice in, Imperial policy

without at the same time taking away the control of that policy from the United Kingdom.

The criticism of the proposals of Sir J. Ward was as unsatisfactory as criticism on an unexpected scheme always is: much of it consisted in verbal points impeding the progress of the speaker in his effort to explain his scheme, though in part this was due to his own complete change of front in advocating a Parliament after proposing a Council. Moreover, he did not improve his case by his somewhat wild naval schemes, which he had probably assimilated from a proposal current in some political and commercial circles, that a loan of a hundred millions should be raised to purchase Dreadnoughts, oblivious of the question of providing men for these ships. His financial calculations were also challenged by Mr. Fisher, whose criticisms were obviously due to an imperfect power of calculation which did not recognize that the revenues proposed to be raised would have easily sufficed to pay interest on the loan and sinking fund, and provide for the replacement of the vessels at the end of the period of fifteen years assumed by the proposer to be the life of a Dreadnought. But the most irritating feature of the whole discussion was the fact that the members present did not seem to recognize that they were being asked to enter into federation, and that the proposal carried with it certain consequences. It is perfectly clear that the proposal meant that the foreign policy of the Empire would be entrusted to the executive, subject to the control of the new Parliament: the suggestion that Sir J. Ward meant to give the negotiation of treaties and so forth to a Parliament was absurd, and still more absurd the idea that the proposal was that this new body should leave to the British Government the management of treaty negotiations and foreign relations, and step in to decide if there should be war or peace. The proposal was clearly intended to create a federation which should, for the sake of preserving as far as possible intact the autonomy of the Dominions, be confined to what was essentially Imperial, the navy and foreign affairs in their connexion with peace and war: doubtless this carried with it the

general control of foreign affairs, as it would be impossible to divorce one side from the other, and also therefore the diplomatic service. But the scheme went no further, had it been set out in detail, than to propose a legislature and executive entrusted with power to deal with naval defence and foreign relations. It would have been satisfied from the executive side by placing the Navy and the Admiralty under the federal executive, and by placing the Foreign Office and the Diplomatic Service under the same authority. The consular service might also have been transferred to it, but that step would hardly have been necessary or even desirable.

When this is realized, it will be seen at once that the criticism of Mr. Asquith upon the proposal was in the main an attack on a proposal which had not been put forward. 'It would impair,' he said,[1] 'if not altogether destroy the authority of the Government of the United Kingdom in the conduct of foreign policy, the conclusion of treaties declaration or the maintenance of peace and the declaration of war, and indeed, all those relations with foreign powers necessarily of the most delicate character, which are now in the hands of the Imperial Government, subject to its responsibility to the Imperial Parliament. That authority cannot be shared, and the co-existence side by side with the Cabinet of the United Kingdom of this proposed body—it does not matter what name you call it for the moment—clothed with the functions and the jurisdiction which Sir Joseph Ward proposed to invest it with, would in our judgement be absolutely fatal to our present system of responsible Government.'

The criticism is of course quite just, but it is a criticism of an imaginary proposal. The proposal of Sir J. Ward was intended to destroy the Imperial Parliament: he made that perfectly clear, for he expressed the view that it really meant that the Imperial Parliament must be replaced by a system of local Parliaments in the United Kingdom, beside which there would be no place for an Imperial Parliament other than his own proposed creation, the powers of which

[1] *Parl. Pap.*, Cd. 5745, p. 71. The defence in *Round Table*, 1915, p. 33 ignores the fact that this was a reply to a proposal of federation.

might in time be increased. Similarly the objections unanimously urged by the representatives of Canada and Australia with much lack of courtesy, and by that of South Africa with much courtesy, ignored the aspect of Sir J. Ward's scheme, which meant that the Imperial Parliament, as at present constituted, would cease to exist, and a new, really Imperial body take its place, with powers of a very limited order. The substitution of the new for the old Parliament would, in fact, have freed the Dominions from any control whatever except the control for foreign affairs and defence at sea, which would be given to the new Parliament. It would, on the one hand, have federated the Empire for defence and foreign affairs, but at the same time it would have freed the Dominions from the, at present, theoretically complete and in practice not negligible, supremacy of the Imperial Parliament. The representative of Newfoundland, though he differed in theory from Sir J. Ward, was less remote from him in spirit than he believed, for he suggested that some representation in the Imperial Parliament might be desirable, as a matter of interest.

But though the discussion was a bad one, and not really based on the true nature of the scheme, it is not to be thought for a moment that the proposal, if better expounded and less deliberately misunderstood by its critics, would have stood any better chance of a favourable reception. The obvious fact was that federation of this sort would deprive the Imperial Parliament of its present supremacy, and in 1911 the Imperial Government were not prepared to limit that supremacy. The Imperial Parliament would have sunk to be a mere Parliament for the United Kingdom and the Crown Colonies: it is a sign of the imperfection of the thinking out of the scheme that it did not indicate what Parliament was to deal with the parts of the Empire other than self-governing: clearly, as they did not fall under the control of the new Parliament, the old Imperial Parliament, even if there were set up separate Parliaments for Scotland and Ireland, must have been needed for some purposes, perhaps for supreme authority over the British

Islands, and the non-responsibly governed parts of th
Empire.[1] But the new Parliament would have been pr
dominantly a British Parliament, inasmuch as the Britis
representatives would have outweighed all the others, an
while in the case of foreign affairs the power exercised t
control these matters would have been new, and th
Dominions would have been admitted to a power whic
they never possessed before, on the other hand it woul
be at the expense of submitting themselves to the will
the majority in the Imperial Parliament in the matter
defence expenditure for the Navy and of the control
naval policy. Now the strategical principle of the founda
tion of local navies is absurdly wrong, as can be seen
any consideration of the matter, but that does not alt
the other factors which affect the question, and, while th
obvious advantages of a single Imperial Navy would hav
been asserted by the Imperial Parliament,[2] the Dominion
would have felt the indignity of being deprived of the rig
to have their local navies as they decided to do in 1909.

In short, the essential features necessary to make a feder
tion acceptable were absent in the discussion of 191
The theoretic power of the present Imperial Parliamen
does not press hardly enough on the Dominions to mak
them resent it seriously, and they enjoy under it a degr
of autonomy, which in a federation they could never hav
while the gain from federation would be very slight, sin
the inequality of the several parts of the Empire wo
result in the preponderance of the United Kingdom
such a Parliament to an extent which would make th
appearance of Dominion power illusory. For the appearan
of controlling the policy of the Empire it would be foll
the Dominions thought, to sacrifice their power over the
own fleets: the Imperial Government for its part felt tha
for the sake of acquiring the power of carrying out a navy

[1] Hence in the suggestion in the *Round Table*, 1915, p. 624, the Crow
Colonies would fall under the Federal Parliament.

[2] So Sir J. Ward, but not Sir W. Laurier in 1911 or now (*Round Ta*
1915, p. 433).

policy on one basis, it would pay much too dearly in sacrificing its control of Imperial affairs generally and foreign policy in particular. No Government indeed will willingly sacrifice anything of its powers but for a very striking good to be gained, and the position in 1911 presented neither the Dominions nor the mother country with any such good.

Moreover it must be admitted that even in foreign affairs the new arrangement would have tended, while it appeared to give the Dominions a higher position, to lower their actual powers. In all cases of commercial treaties the negotiations would under the new system have had to be carried on by the executive Government of the Empire, and in their hands it can hardly be supposed that the same regard to Dominion wishes would have been paid, as is now paid by the Imperial Government. For instance, the compact made in 1911 by Canadian ministers with the United States Government was in all probability an unwise one in the interest of the Empire,[1] and, if constitutionally the negotiation and the approval of it had rested with an Imperial Executive, it is idle to suppose that the matter would not have been subject to careful consideration, in which the wishes of the representatives of the United Kingdom must have prevailed. Doubtless such a view was very present to Sir Wilfrid Laurier, whose visit to the Imperial Conference had only been arranged with great difficulty by means of a truce for a short period in his great fight with the Opposition to carry his proposed fiscal arrangements into effect: doubtless, too, the same consideration occurred to the Governments of the other Dominions. The position is yet more complicated when it is remembered that foreign policy and commercial tariffs are often closely related. Germany for years imposed disabilities on Canada, and Canada retaliated, without the relations between Germany and the United Kingdom being seriously affected: such a position would hardly be possible if an Imperial Executive dealing with all the foreign affairs of the Empire were set up. It is not that separate arrangements for

[1] Cf. *Canadian Annual Review*, 1911, pp. 57 seq.

different parts of the Empire could not be made as easily as of old, but that the tendency would be for an Imperial Executive in the full sense to hold its views superior to any opinions of the local Governments.

Nevertheless, the rejection of the idea that the Imperial Government, as now constituted as the Government of the United Kingdom, can share with any other authority its responsibility for foreign affairs is a doctrine which, as pointed out by Sir Robert Borden, in his speech in the House of Commons of Canada in moving the introduction of the Naval Aid Bill on December 5, 1912, could have but one disastrous end, if persisted in when once the Imperial Government ceased to be able without Dominion assistance effectively to protect the Empire. There are, indeed, only two alternatives available for the future of the Empire: either the doctrine that the Imperial Government cannot share responsibility can be persisted in, which must mean that the Dominions shall become independent for purposes of international law of the Imperial Government, as they cannot remain indefinitely in the humiliating position of dependencies without share in foreign policy, or in the alternative some means of associating them in the control of the Empire must be found, which shall fall short of federation. That at the present time is out of the question in view of the fact that federation would mean to the Dominions a subjection of their individuality with no real control conceded in return, while for the United Kingdom it would mean loss of unquestioned authority for an inadequate return. It is perfectly true that in one sense of the word there can be no sharing of responsibility by the Imperial Government, in so far as the ministers can be responsible in point of effective practice only to the power which makes them ministers and unmakes them, the House of Commons, as representing the people of the United Kingdom. But this fact in no way prevents them in effect, if they think fit, sharing in quite a considerable measure the burden of their responsibility for the defence of the Empire and the conduct of its foreign policy with states

men from the self-governing Dominions. The people of the United Kingdom already recognize and will recognize in increasing measure the fact that the Dominions are vitally interested in questions of this policy, which has led them to be involved in a war of the first rank. They will be prepared for a time to accept a position in which ministers, while responsible to them alone, can yet plead that their action must be regarded, not merely from the narrower British point of view, and can quote the approval of the Dominions as a part of their justification. In this sense, prior to federation, it may be possible to secure the Dominions a larger share in the control of the defence and foreign policy of the Empire. No such arrangement can be more than a preliminary stage, either on the one hand to federation or on the other to independence and perhaps alliance, nor is it well to be under any misapprehension on so fundamental a point as this. But in politics it is necessary to progress in the way and at the speed which is most practicable. The effect of the war may be to cause the desire of federation to develop in the oversea Dominions: it may produce the view that in the United Kingdom there should be a division between those who conduct domestic affairs, and those who busy themselves with foreign policy. It is perfectly true that foreign policy has been seriously hampered by the fact that the Government has never been able to devote the due amount of attention, and that domestic policies have prevented the people from understanding the dangers of the attitude of Germany in anything like a full degree. But it is certain that the divorce of the control of external affairs from the control of internal affairs is a thing which will be but slowly accomplished in any case, be it in the United Kingdom or the Dominions, and it is therefore necessary not lightly because of theoretical considerations to maintain that there is no choice between the non-participation of the Dominions in the control of defence and foreign policy and the accomplishment of a federation. This, if it is held to be Mr. Asquith's attitude in 1911, can hardly have been his attitude in later years.

CHAPTER II

THE INDEPENDENCE OF THE DOMINIONS

THE natural solution for the position of the Dominions suggested by the result of the Conference of 1911, is that each Dominion should proceed to attain complete independence as a unit of international law, and that the Empire should be reconstituted on the basis that on the one hand should stand the United Kingdom in political control of the Crown Colonies and of India, and on the other hand the self-governing Dominions, each as an independent State. Or at least, if the suggestion seems rather absurd when put in this wider aspect, the great self-governing Dominion of Canada should declare its position to be that of an independent State, leaving it for Australia, New Zealand, and South Africa to follow suit either at once or in due course. It is not suggested that this independence need be separation: the Dominion might still under its new status remain a kingdom closely allied with the United Kingdom in sentiment and under the same monarch, but nevertheless as an independent unit in international law, and therefore internationally not responsible for or involved in the blunders of British foreign policy. The proposal has a faint resemblance to that made by certain politicians of Victoria in 1870, but it differs from the lucubration of Sir Gavan Duffy and his friends in its greater clearness of outline and understanding of international politics: it is not suggested that the Dominions should seek to be neutralized, still less that if they were neutralized they would be at liberty to afford aid to the mother country with the greater effectiveness arising from their position as independent States. The Dominions are to stand on their own feet as nations, prepared to accept

the duties as well as to avail themselves of the rights of the status of States of international law.

The case for the independence of the Dominions and primarily of Canada deserves careful consideration, because it has been set out in full detail and with many and varied arguments by a Canadian, Mr. J. S. Ewart,[1] who has for some years conducted to the best of his ability a movement destined, as he hopes, to carry out his scheme in a complete form. He recognizes that as a practical policy, and perhaps also on theoretic grounds, it is not desirable to set out any scheme which would result in the dissolution of any link of union between the United Kingdom and the Dominions and leave the later independent States divorced wholly from the United Kingdom. This view is clearly sound, as a matter of political possibility. The idea that the Dominions might desire and achieve independence, and that the Imperial Government might well be content that it should be freed from them, has disappeared into comparative oblivion with the growth of the Dominions and the obvious interest which they display in their connexion with their native land. Professor Goldwin Smith adhered to the last to his view that the natural destiny of Canada was union with the United States, but he lived to see the Dominion growing more and more self-reliant and less and less inclined to do anything which might hasten her steps in a direction which she did not desire. The Labour Party in the Commonwealth has been accused of lack of interest in the mother country and of republicanism: these accusations made at the general election in 1914 were repudiated by those attacked, and the people of the Commonwealth showed their disbelief in them by returning the suspected party to power, where it spent all its exertions to accomplish its declared desire to afford the Empire all its possible aid. It would be idle to doubt the attachment of the people of New Zealand and of Newfoundland to the mother country: the inhabitants of the Dominion may be willing to believe with the Chief Justice that they have

[1] In *The Kingdom of Canada* and *The Kingdom Papers*.

before them a glorious future, but they do not share hi
dislike of the Imperial Government, nor have they take
very seriously his efforts as judge to assert the sovereig
powers of the legislature of New Zealand: in Newfoundlan
the attachment to the United Kingdom is remarkable i
its intensity. In the Union of South Africa, alone in a
the Dominions, can there be seen any trace of a desire f
republican freedom, and the ghastly bad faith which tha
desire has involved on its authors, and their share in th
rebellion which they so wrongfully brought about, may
held to have discredited republican leanings in the Unio
for the time being at least.[1]

This fact, however, of the clear desire on the part of th
Dominions, as shown by their remarkable support of t
United Kingdom in a war which they had no chance
preventing, imposes a serious burden on the statesman w
wishes to press for the formal transformation of the relatio
of the United Kingdom and the Dominions, for it compe
him to show that it would be compatible with the constit
tion of the United Kingdom that the Dominions, wh
becoming units of international law, should remain und
the same King as the United Kingdom. The fact is not
all obvious, and the proof requires great care. It rest
putting aside the case of the Ionian Islands, which cann
be taken as a serious parallel to even the smallest of
Dominions, on the fact that from 1714 to 1837 the Impe
Crown of the Kingdom of Great Britain and Ireland
worn by the ruler of Hanover, and that from 1603 to 1
the union between the two Crowns of Scotland and Engl
was personal. During that period the sovereignties remai
quite distinct, the countries had separate flags and coina
the Parliaments were independent, and imposed vari
restrictions on the trade between the countries, and fin
the two Parliaments enacted laws which but for u

[1] The return of 27 Nationalists at the election of October 1915 is a
that, despite the loyalty of the Union, there is a republican spirit.

[2] Ewart, *Kingdom Papers*, i. 178 seq. Cf. Ward, *Great Britain*
Hanover.

would have resulted in the separation of the thrones on the death of the reigning Queen. The same procedure was in force when the Crowns of Hanover and Great Britain were united: the two Governments were absolutely distinct, the Hanoverian being purely despotic, the English parliamentary; the flags were distinct, and the terms on which the King of Great Britain held his throne expressly denied the obligation of that country to engage in any sort of war in respect of his other possessions, unless with the consent of Parliament. It is sometimes forgotten that, so long as the Hanoverian Crown was united with that of Great Britain, the royal prerogative of declaring war was fettered by this express restriction. Moreover, it is certainly the case that the distinction of the two kingdoms was recognized throughout the period in international law. As Elector of Hanover, George I took part in the war between Prussia, Denmark, and Russia on the one side, and Sweden on the other, and for his assistance in this regard was given the occupation of certain Swedish territory: the British Fleet made some demonstrations in the Baltic, but this was alleged to be due to the need to protect British merchant vessels, and in point of fact the friendly relations of the Swedish and British Crowns were never interrupted. Similarly, the efforts of Peter to obtain subsidies from his ally, George, were met with the reply that as King of England he was not at war with Sweden but would perform his obligations as Elector of Hanover, and the good offices of England were used as a means of bringing about peace between Hanover and Sweden. The same distinction was observed consistently later on: the two kingdoms remained distinct, and the actions of the Governments of the two varied from time to time in no small degree. But the possession of Hanover was never regarded with unmixed satisfaction by British statesmen, and its loss by the operation of the Salic law on the accession of Queen Victoria was regarded by public opinion as an unmixed blessing.

It must, however, be noted before accepting the complete parallelism which it is suggested might be drawn between

the case of the Kingdom of Canada and a Kingdom o
Hanover, that the position of the Kingdom of Hanove
was not quite as satisfactory from the point of view o
independence as might be expected from its theoreti
position. In the later days of its existence the power o
Britain so overshadowed that of Hanover, that at th
great European conferences, such as those which decide
the fate of Europe in 1815, the King of Hanover played n
part at all. He was ignored as much as the other numero
petty princes of German States, even when they remain
sovereign, were ignored by Prussia, Austria, and Gre
Britain. The illustration is important because it indicat
that the parallel between the position desired for Cana
as a kingdom and Hanover is not complete. Hanov
could be ignored because its King was a despot, who h
behind him the power of his British Kingdom, but it
precisely at such conferences as the great Conferences
The Hague, that the Dominion as a Kingdom would de
to be represented, and at such conferences history sho
that Hanover was not represented, and did not have a vo
Similarly, history shows that Great Britain and Hano
could make treaties with each other, but the terms of th
treaties remind us that Hanover was politically the K
not an independent power.

This indeed is the precise spot in which the argum
from Hanover breaks hopelessly into pieces. It was
enough in the early days of international law and respons
government, when the personal rule of the King
a matter of importance, to permit the two kingdoms to s
together as independent units, and to allow the Kin
be in one an independent sovereign ruling despotically
in the other to be a King falling more and more under
control of ministers, though it must be remembered
down to nearly the end of the eighteenth century
power of the King was enormous, thanks to his contr
patronage. Would it be now possible for the same
to be sovereign of two Governments which in fo
affairs acted contrary to the views of each other?

difficult to think that this would be possible: the personality of the King having vanished as an element in the function, you are faced with the Governments of the countries, and that these Governments would be content to have the same monarch if they were opposed in foreign policy is most improbable. Moreover, a practical difficulty of great importance exists: if there were to be two sovereignties, and still more if several, the question must arise whether the King was to retain power to appoint a Viceroy or whether the office was to be hereditary in some member of the royal family. In the former case the dependence of the one kingdom in status would be obvious, while in the other the position of the Viceroy would be extremely difficult, if the policy of the two Governments was to diverge seriously. The union of Hanover and Great Britain was rendered easy enough because the first King was fond of visiting Hanover and leaving his minister to rule England in his place, while, when he was in England, Hanover was governed by his directions, but since George III, the United Kingdom would, it may safely be said, not tolerate that the sovereign should for any substantial length of time be absent from the Kingdom.

It may be feared therefore that any real attempt to alter the constitution of the Empire on the model of Hanover would involve serious risk of the breaking up of the Empire into totally independent States, without even a personal relationship in the case of the monarch.[1] Or in the alternative an attempt at such a relationship might in the long run lead to a closer union, as in the case of England and Scotland. It is nevertheless possible that the status might be created and last some time, and it is therefore desirable to consider the arguments adduced in favour of the position.

[1] If the monarch remained the same by English law, all his subjects would be to one another not aliens; *Isaacson* v. *Durant, in re Stepney Election Petition*, 17 Q.B.D. 54. No doubt this could be altered by legislation. On the separation of the Crowns, Hanoverians became aliens, just as on annexation Boers became British.

In the first place it is asserted[1] that the assumption
independence by Canada would be an assertion of fact, sin
in fact it is independent and since this fact is accepted
British statesmen. This statement is, however, a serio
over-statement and can hardly have been carefully thoug
out. It is true that distinguished British statesmen ha
made a number of statements which seem in agreeme
with Mr. Ewart's assertion. Mr. Chamberlain, out of offi
has called the Dominions 'states which have voluntar
accepted one crown and one flag, and which in all else
absolutely independent of one another', and has talked
them as 'sister states equals of the United Kingdom
everything except population and wealth'. Lord Curz
has spoken of the Dominion Governments as 'partners
free as ourselves and with aspirations not less ample
keen'. Sir H. Campbell-Bannerman at the Colonial C
ference of 1907 called freedom and independence the esse
of the Imperial connexion, Mr. Lyttelton talked of pract
equality of status, and Mr. Balfour of formal equality,
so forth. These assertions may be strengthened by
vords of Mr. Asquith that the United Kingdom and
Dominions are 'each master in their own household, a p
ciple which is the life blood of empire, *articulus stantis
cadentis imperii*'.

It is needless to say that neither these assertions nor
more guarded conception of Sir F. Pollock, that the Do
ions are 'separate kingdoms having the same king as
parent group, but choosing to abrogate that part of
full autonomy which relates to foreign affairs', have
close relation to facts. Despite Mr. Asquith's words
Conference over which he presided declined to allow
Zealand to pass into law her Bill to suppress the u
lascar crews in her trade, or to add to the powers of Can
or Australia or South Africa to deal with merchant shipp
and the Commonwealth Government had to concede
position as to its legislative power asserted by the Imp

[1] Ewart, *Kingdom Papers*, ii. 203, 204. It is useless to cite these th
of rhetoric as serious argument.

Government and advise the Governor-General to reserve the Navigation Bill on the pain of finding it waste paper, when it was challenged in the courts, from which they could not prevent an appeal lying to the Imperial Privy Council, without obtaining the sanction of the Imperial Government. In 1915 and 1916 Canada had to come to the Imperial Parliament in order to secure the amendment of its constitution in matters of great moment. Granted that the Imperial control is exercised with consideration and restraint, can it be pretended that the Dominions are independent nations, when the Imperial Government can in 1914 suggest to the Union of South Africa that in its Indemnity Bill it should avoid seeming to claim the power to legalize the continuation of martial law under statute? Or are independent nations subject to have an Act of 1819 invoked in 1907 to override their duly enacted laws because their views of policy do not suit those of the Imperial Government? That in many of these matters more liberty should be accorded to the Dominions is perfectly proper to argue, as has been seen above, but the fact of independence is far from being yet attained.

The matter is still more striking when the question of treaties is raised. Mr. Ewart claims that Canada has made her own treaties, but the claim cannot be made out for a moment. Canada has concluded several agreements, but internationally they are waste paper, and neither the Dominion Government which concluded them nor any foreign power thought otherwise. The essence of a treaty is that it is definite in duration, or, if indefinite, that it is permanent. The agreements made by Canada with Germany and Italy were agreements of no defined duration, which merely resulted in action by both parties in the way of legislation, while that with the United States ended in a refusal of the Canadian Parliament to legislate. Had it been a treaty it would have imposed an obligation to secure legislation: as it was, it resulted merely in an agreement between statesmen to try to obtain concurrent legislation in the two countries. The department of external

affairs of Canada has no power to negotiate with any foreig
country whatever, and the negotiators of the agreeme
of 1911 went formally to the British ambassador in ord
to be placed in touch with the United States Governme
The negotiations with the German and Italian cons
imposed no obligation on either side: the Governme
agreed to ask the Governor-General to sign an Order
Council bringing to an end the surtax on German goods
the German Government would also cease imposing spe
taxation on Canadian goods, but it was expressly decla
that the arrangement was merely temporary, with a view
a treaty being negotiated, and similarly in the case of Ita

Mr. Ewart, however, lays stress on the fact that Article
of the Boundary Waters Treaty[1] with the United Sta
provides that 'any question or matters of difference ari
between the high contracting parties involving the rig
obligations, or interests of the United States or of
Dominion of Canada either in relation to each other
to their respective inhabitants may be referred for deci
to the International Joint Commission by the consent
the two parties, it being understood that on the part
the United States any such action will be by and with
advice of the Senate, and on the part of His Maje
Government, with the consent of the Governor-General
Council'. This agreement is relied upon by Mr. Ewar
showing that the power to discuss any subject with
United States has been formally given to Canada in p
of procedure through the Governor-General, the Colo
Office, the Foreign Office, and the British ambassa
before reaching the United States Government. The
is, of course, absurd: the reference is expressly stat
the treaty to be one made by the high contracting par
i.e. the Imperial Government, or strictly the King on
advice of his Imperial ministers; in respect of Ca
being vitally interested, the King will act on the advi
his ministers with the consent of the Canadian Governm

[1] Cf. *Round Table*, 1915, pp. 851–5. The omission there to cite t
of the clause may be misleading.

if he thinks fit to agree with their advice. The point of the words is obvious: it is to ensure that the reference of any subject to the Commission is made with the consent of Canada just as, in the arbitration and the pecuniary claims treaties, the assent of the Dominions in cases where they are specially interested is set off against the right of the Government of the United States to obtain the assent of the Senate. In such a case the procedure has necessarily to be most formal, and the assent of the Imperial Government must be expressly obtained. But in normal cases minor matters between Canada and the United States are, and have been for many years, disposed of by direct communication between the Governor-General of the Dominion and the British ambassador at Washington, while the Imperial Government is informed of anything of importance by one or both of these officers, and so can intervene.

The second reason adduced by Mr. Ewart is that in defence matters the declaration of independence would be of the greatest advantage, since it would remove Canada from the danger of being involved in British wars, while it would be wholly unwise to lean upon British assistance if there should arise need for it: nay nothing in British history gives any assurance that the only use of an emergency made by the British Government would not be to cement her friendship with a foreign state at the expense of Canada. On the other hand, it is intolerable that, while Great Britain can rely on Japan in certain circumstances or on France, she could not rely in any event on active aid from Canada. In the case of independence there would have to be a definite arrangement, which would be better for both.

Now the position of Canada in regard to war obligations is undoubtedly curious, since she can be involved in war without her consent, but need not fight if she does not wish to so so. It is, however, obvious that another way of avoiding the anomaly presents itself: Canada might acquire a voice in deciding questions of war. The lack

of obligation on Canada to fight for the Empire is certain, the treaty of alliance with Japan imposes an obligation by British constitutional law on the United Kingdom alone to succour Japan in the events contemplated, but the disadvantage is one which accrues to the United Kingdom, and hardly a reason for insisting on Canadian independence in itself. But the assertion that Canada cannot rely on British support in any difficulty must be met as being both counter to theory and to fact. The theory is undoubted: apart from the earlier admissions of statesmen made to the British House of Commons in 1861, it was made clear in the negotiations regarding Canadian defence from 1864 onwards that the obligation to afford Canada every protection was in the fullest degree recognized by the Imperial Government, and the same thing was repeatedly asserted at later times as at the Colonial Conferences of 1902 and 1907, and in Parliament by the First Lord of the Admiralty in 1914. The constitutional doctrine still holds good down to the present time that the obligation of defence in the case of the Imperial Government is absolute.

The real question therefore arises whether in point of view of history the defence has failed. It is needless to say that the errors of 1783 and of 1814 have nothing to do with Canadian self-government: the treaty of 1842 may be considered as having been concluded after that system had set in, and in that regard recent research has shown that the treaty was an excellent piece of diplomacy for the United Kingdom, making good in no small degree earlier errors. The Reciprocity Treaty of 1854, negotiated by Lord Elgin, was a splendid bargain for Canada, and the United States were very glad in 1866 to be rid of it. No is there the slightest doubt that the Treaty of Washington of 1871 was an excellent one for the Dominion: the United States Government terminated it with much pleasure in 1885, and when a new treaty embodying some of its provisions was negotiated in 1888, the United States Government could not obtain its ratification.[1]

[1] Sir C. Tupper, *Recollections of Sixty Years*, pp. 371, 391.

The accusation[1] is, however, made that the case of Canada in the matter of the control of the bays on the coast of the Dominion against American fishermen was seriously injured by the British policy of concession. The first charge is that the Bay of Fundy was conceded in 1845, but the sufficient answer is that the Government of Nova Scotia was prepared to agree, and did so, and the objections of that Government to the opening of other bays were respected. Secondly, it is objected that in 1866 the British Government insisted on the reduction of the Canadian claim to exclude United States fishermen to the case of bays with mouths not exceeding ten miles in width, the three mile line being drawn from a line between the headlands at the point where the bay reached that width. The rule, however, then laid down and accepted by Canada was based on the fact that the United States Government denied and had a right to deny, if they thought fit, the British claim to bays *in toto*, and therefore the British Government were in the position that they must either insist on making good their position at the risk of war or must adopt a compromise which they could be certain of carrying with an arbitral tribunal if asked to arbitrate. The third charge, the opening of all the bays from 1870 onwards by a system of licences or by treaty, was a policy in which Canada thoroughly concurred, and the reason for her concurrence can be seen from the proceedings of 1887, when she tried to enforce exclusion of American fishermen by the policy of forbidding them to purchase bait in Canadian waters. The United States Congress passed a non-intercourse Act, and though Mr. Ewart considers that this Act was a mere 'bluff', it is sufficient to say that Sir C. Tupper, who was the joint negotiator with Mr. Chamberlain of the treaty of 1888, regarded the measure as a very serious menace to the position of Canada, and doubtless his view, based on his knowledge, as minister, of the whole position, must be held to have been correct. It is fair indeed to record in favour of Canada that, during the whole period of the fishery

[1] Ewart, *Kingdom Papers*, ii. 113–46.

negotiations, she realized that the position was complicated, and that the differences of opinion between her and the Imperial Government as to the degree in which the rights of the British Crown should be enforced turned in the main on details. Moreover, it is undeniable that the British case at The Hague in 1910 was fought with an excellent persistence, and that the British Government gave valuable assistance through the Attorney-General. Mr. Ewart complains that it had been expected that Canada and Newfoundland would be allowed the complete control of their own case, but the assistance of the British Government was appreciated and valued by the Dominion and the Newfoundland Governments, and took place with their full concurrence, apart from the fact that in the case of a treaty the intervention of the Imperial Government was both constitutional and necessary.

Another charge[1] against the United Kingdom is that the interests of Canada in the Behring Sea case were neglected by the Imperial Government, and in special by Lord Salisbury, who spent his time in giving away concessions to the United States. The accusation is, however, hardly borne out by the facts: the United States Government did desist from seizures in Behring Sea after asserting its full right to make them,[2] and it is idle to presume that it did so out of any other consideration than that it felt that it could not go to war with the United Kingdom on the question at issue: it is not to be supposed that the United States feared Canada. The fact that the ultimate result of the negotiations was an arrangement which restricted the rights of Canadians to take seals on the open sea was due to the obvious consideration which every scientific man admitted, that the process of killing seals on the open seas was not merely barbarous but very wasteful, and in 1911 Canada herself fully agreed to a treaty, which included Japan and Russia, and set up the principle that all pelagic sealing was a nuisance, and should be put down, compensation, on the other hand, being made to the pelagic

[1] *Kingdom Papers*, ii. 59–112. [2] Above, p. 17.

sealers for being shut off from their occupation. The Canadian Government accepted the seal fishery arrangements, for it recognized that the claim of the sealers to exercise their occupation was one which was undeniable, but which, unless carefully regulated, would have resulted in the rapid destruction of the seal herds, and the end of the sealers' occupation, and their reward was the wise treaty by which the seals are protected for the most part, and the Dominion compe[illegible] for giving up the right of its subjects to engage in [illegible] desirable trade.[1]

Far more serious is the co[illegible]nt made by Mr. Ewa[illegible] of the conduct of the Alaska bo[illegible]ary arbitration with the United States of America. It is difficult, if not impossible, to condone the folly which caused the British Government to insist that there should be a British arbitrator on a tribunal which was to deal with a question purely Canadian, and to keep him there when it was learned that the impartial jurists of repute stipulated for by the treaty had been chosen from gentlemen who had declared themselves irrevocably opposed to the British claims, though their mistake in this regard was shared by Canada, who adhered to the original choice of arbitrators. The choice of Lord Alverstone was singularly unfortunate, as he belonged to a type of man, good and clever enough, no doubt, but completely at the mercy in point of tactics of his American colleagues, and he was, moreover, determined to have the question solved. In the result he produced a settlement in flat defiance of his Canadian colleagues which could only be called ludicrous, as it contravened every principle of common sense and geography in its location of the initial part of the boundary line, spoiling the frontier, and making it indefensible from a strategic point of view. The worst of the matter was that it was quite clear that he had yielded on this point merely to secure a settlement. His concession of the other points was perfectly legitimate as a judicial finding, even if it may seem to some that he misconceived the weight of

[1] *Parl. Pap.*, Cd. 5971; 6091, pp. 12, 13.

[2] *Kingdom Papers*, ii. 108.

the argument, but his yielding of the question of the boundary among the islands could not be defended. His conduct was bitterly resented for years in the Dominion, and, had it not been that the importance of Alaska has diminished considerably of late, the injury done by his errors and complaisance to the relations of the Dominions and the United Kingdom might have been incalculable. Fortunately, the Alaska episode is isolated, and probably on it alone has been based the prevalent idea of the British Government as sacrificing the Colonies cheerfully for the sake of popularity.

A further objection to connexion with the United Kingdom is based by Mr. Ewart on the ground that in the Hague arbitration the British case had to meet the fact that the headland doctrine had not been insisted upon by the British Government elsewhere, but that that Government had endeavoured in Europe to restrict it as closely as possible. This accusation, however, seems wholly groundless: the British case rested throughout on the definite fact that the treaty of 1818 dealt with the bays of North America as being closed waters, the three mile limit of exclusion being drawn from the coasts and the bays, not from the coasts *of* the bays. To this contention the United States Government proved to have no adequate reply of any kind, and the terms of the treaty made the British practice elsewhere irrelevant. Nor does it seem to have weighed with any of the arbitrators, who paid most stress to the terms of the Treaty of Washington of 1888, which never came into force, but which made practicable suggestions for the decision of the bay question, suggestions depending on the opinion of the Canadian negotiator, Sir Charles Tupper, who defended his views on these points with great vigour and success in the Dominion House of Commons, in moving the approval of the treaty.

In truth, the complaints made by Mr. Ewart seem to point to failure to realize the essential features of foreign negotiations, namely that the British view of what is right is not necessarily the only view, and that *inter se* great powers cannot simply issue orders. The concessions and half

measures of the British Government he constantly represents as grievous failures, and contrasts them with the strong words of Canada, but Canada had between it and the United States the British buffer, and the real question to be put is rather what attitude would Canada have been able to adopt *vis-à-vis* the United States, had the Imperial Government not been at hand to bear the brunt. Unless *per impossibile* it can be said that Canada would have done better for herself by herself, it is idle to hold that Canada has suffered from British protection. Nor in quite recent years would Canada deny the value of the aid given by Mr. Bryce as ambassador, in negotiating for her one treaty after another of the highest value and importance.

In the third place, it is argued that by becoming an independent State Canada would be able to take part in international Conferences, such as that of The Hague and the London Conference, and be able to give her opinion contrary to the British view, in favour of the immunity of merchant ships from capture at sea.[1] If the delegates of Canada would have done anything so excessively foolish after having the opportunity to hear the views of British Admiralty experts, it may well be doubted. But, if they had, they would certainly, as theory before and practice in the present war shows, have been entirely wrong. But the demand that Canada should be allowed to take part in these Conferences is in itself entirely right, and such participation would be of the greatest aid to educate Canada in the nature of foreign politics, a fact on which Mr. Ewart justly lays great stress. But it is premature to suggest that Canada cannot be represented without becoming independent: it is true that the Imperial Conference[2] of 1911 merely went so far as to assure Canada and the other Dominions the right to take part in the preparation of instructions to the delegates to the Conferences in future and the circulation among the Dominions of treaties affecting them before

[1] Ewart, *Kingdom Papers*, ii. 243–53. This paper was dated June 1914; August sufficed to show its complete erroneousness.

[2] *Parl. Pap.*, Cd. 5745, pp. 15, 130–2.

signature. But the restricted nature of the proposals was merely due to the fact that the Dominions did not ask for any more, and it is an established maxim of governments to concede so much as is asked for and no more. There appears to be no reason whatever why the right to take part in these Conferences by plenipotentiaries should not be accorded to Canada, and yet Canada might remain part of the Empire, her plenipotentiaries receiving their full powers under the great seal of the United Kingdom on the responsibility of Imperial ministers. The plan has been adopted for a conference of quasi-political character, that on wireless telegraphy, and the precedent might well be followed in a future case.

In the fourth place, it is contended by Mr. Ewart that the change would make for clear thinking, and that confusion results from the fact that Canada to-day is held to be part of the Empire, while in fact it is not part at all. The question here seems to be begged: there is no conceivable reason why there should not be clear thinking as to the present relations of the Empire, and the objection to the use of 'empire' of the British Empire, though it has the authority of Lord Milner, is a singular example of logical fallacy. Empire, it is argued, on no conceivable ground, means that part of the Empire is subject to the United Kingdom. But in truth, empire merely means a sovereignty, and says nothing about the relation of the parts: an empire composed of self-governing communities is not in the slightest degree anomalous: obvious instances are the Empire of Austria and the Empire of Germany, or the former Empires of Brazil or Mexico. The Empire of India is not given that title because[1] it is subject to the United Kingdom, but because it is a sovereignty in itself. Nor in truth is there any other term by which the congeries of communities which make up the dominions of the King can well be called, and the collective name 'empire' means merely that the whole, for purposes of international law, consists of one single sovereignty.

[1] Plainly this is Lord Milner's view, *Standard of Empire*, May 23, 1908.

A more serious consideration is the fifth, that the change of relationship would relieve the Imperial Government of difficulties arising from the anomaly that, though part of the Empire, Canada does not submit to allow to enter her territories any British subjects save such as she chooses. It is pointed out that it is difficult to understand, if Canada is part of the Empire, that she should refuse entrance not merely to Hindus but also to Englishmen, if they seem to fall short of her exacting standards of late years. It is difficult for India to understand that a self-governing Dominion cannot be coerced, when they know that their Government at home is manifestly subject to very close control by the Imperial Government. Nor is there any doubt that there is force in this argument: if Canada were an independent power, then on the one hand the position of the Imperial Government *vis-à-vis* India would be as simple as it is in the case of the United States, and on the other hand, the Imperial Government could deal with Canada more frankly and freely when it had over it no legal authority, but merely the considerations of courtesy and international law.

The position of India with regard to the self-governing Dominions is indeed one of the greatest difficulty and complication, nor can any solution immediately be expected. It is difficult for India to appreciate the position of the self-governing Dominions: it is true that in practice the self-governing Dominion of the Union of South Africa treats British-Indians worse than any foreign possession, and that they were before the European War less harassed in German possessions in Africa than in Natal, to the prosperity of which they have contributed so greatly. Nor is it unnatural that, when an Indian cannot set foot in Australia without being exposed to insolence from petty officials, it should be asked why Australians should be entitled to compete in the India Civil Service examination, and be appointed to posts in India. But to recognize the difficulty of the position and to despair of a solution are very different things, nor is it worth while to untie the bonds of empire because Canada

prefers Galicians to British-Indians, and ejects British subjects who fail to establish themselves within three years, acting sometimes with great unfairness and injustice. The assistance rendered to the Empire by the Indian[1] forces in the European War must have its effect in breaking down the worst of the prejudices prevailing among the colonial forces: it cannot be without a lesson to the more intelligent of our fellow subjects in the Empire, that, while India was able to send men to the front in France at the time of greatest need, the Dominion in which Indians have been treated worst not merely was powerless to send aid, but was in the throes of a dangerous rebellion.

Finally, Mr. Ewart contends, the status of colony is one which is unworthy of the self-respect of the Dominion. 'The colonial status', says Professor Leacock, 'is a worn-out, bygone thing. The sense and feeling of it has become harmful to us. It limits the ideas and circumscribes the patriotism of our people. It impairs the mental vigour and narrows the outlook of those who are reared and educated in our midst.' Or, as Dr. Parkin says, 'If the greater British colonies are permanently content with their present political status, they are unworthy of the source from which they sprang.' All this must at once be admitted:[2] if the Dominions were to be content to entrust their foreign policy to the Mother Country, and to lean on that country for defence perpetually, they would show a failure of vigour which would be deplorable, but the supposition that independence is the only way to solve the problem is not correct nor reasonable. The process of development of the Dominions has been slow but sure: they have grown from strength to strength and have attained more and more the stature of nationality: they are not now colonies, save from the point of view of formal law, and the use of the word 'colonial' is due only to the fact that the substitute 'Dominion' is difficult to adapt for all adjectival purposes

[1] So also as regards Japan; cf. *Round Table*, 1915, p. 493, as to New Zealand feeling.

[2] Cf. *Round Table*, 1915, p. 624.

But that their emergence into national life should be by way of independence, perhaps followed by a closer union, is rather an unreasonable theory, and those who have expressed the view, that the development of national status is a necessary preliminary to closer union, did not as a rule mean that the Dominions should first become independent: they meant only that the fullest development of autonomy consistent with the unity of the Empire is a necessary phase of the development of the Dominions. This would be fully admitted by Sir Robert Borden, but he has enunciated the principle that it now lies to extend the nationality of the Dominions, not by excluding them from British nationality,[1] but by giving the Dominion a just share in the control of foreign policy in return for their assumption of a just share in the burden of defence.

There can indeed be no doubt that the two things are inseparable. The acute mind of Sir Wilfrid Laurier[2] has always seen that the two go together: if advice is given and acted on by the Imperial Government, the Dominions, he pointed out at the Imperial Conference of 1911, are morally bound to follow up that advice by assistance in war. In this Sir Wilfrid sees more clearly than Mr. Ewart, who considers that Canada might properly have pressed the United Kingdom to adopt the suicidal policy of exempting merchant vessels from capture at sea in time of war, without accepting any responsibility for this advice. That position is impossible if advice is meant to be considered seriously, and a great Dominion should not offer platonic remarks on vital issues of the conduct of war.

[1] The ideal of M. Bourassa (*Que devons-nous à l'Angleterre?* Montreal, 1915).

[2] *Parl. Pap.*, Cd. 5745, p. 117; *Round Table*, 1915, p. 431.

CHAPTER III

IMPERIAL PARTNERSHIP

THE chief claim which the solution of the independence of the Dominions as ending the complications of the present relations of the Empire can make is that it would be simple. It would be effected by nothing more than a treaty and an Imperial Act ratifying the treaty. With this there would fall to the ground the marks which formally show the position of a Dominion as a dependency, the selection of the Governor on the advice of Imperial Ministers, the power to withhold assent to Acts of Parliament or to disallow such Acts if assented to by the Governor, the power to pass Imperial legislation applicable to the Dominion, and the subjection of the Dominion Courts to the control of the Judicial Committee of the Privy Council. The new State would have to decide in what manner it would constitute its Executive Government and its Legislature and much would require to be done to arrange for its recognition by the powers and to set up the régime in full form, but the difficulties would be comparatively small. It is a much more difficult thing to devise some plan by which the Dominions may retain their autonomy, but yet may be associated in Imperial policy and play their part in Imperial defence.

It is important to note that the difficulty as it now presents itself is not one of material means of furthering the growth of the Empire. The Dominions have grown without sacrifice means to greatness, and they feel that they must have in some way a national status, a feeling which of course has been greatly strengthened by the facts of the European War. No country which has played its part in that struggle can ever again be expected to content itself with the position of a mere dependency. The change of emphasis is undoubtedly for the better: the old struggle over Imperial Preference

was one in which there could be difficulty due to mere pecuniary considerations, and such differences are less amenable to treatment than differences regarding more intangible things. The stress laid on Imperial Preference may, perhaps, be traced as a matter of history to the strong efforts made by Sir Charles Tupper[1] to impress this doctrine upon his contemporaries as the one mode of effecting Imperial unity. The proposal in his mouth was an extremely natural one indeed, for he was anxious to build up the Dominion of Canada at a time when, in 1891, there was no sign of the realization of the great prospects of the Dominion, and it was only right that he should advocate a policy that seemed to him to promise Canada the population which she so urgently needed, and which persisted in flowing to the United States. Moreover, he had assured himself from a study of the effect of a rise in wheat prices on the cost of bread that a rise in the price such as would be caused by the imposition of a tariff on non-colonial wheat imports would not affect the price of bread to the consumer. To his view, therefore, the project of Imperial Preference for Canada, and in modified shape, e.g. in reduced duties on Colonial wool, for other parts of the Empire, seemed feasible and inevitable. This view was expressed by Canada, the Cape, and nearly all the Australasian Colonies at the Ottawa Conference of 1894; but the Imperial Government of the day deliberately rejected it as contrary to the principles of Free Trade and unlikely to benefit the United Kingdom or the Colonies themselves, while leading in all probability to difficulties with foreign powers, though it was explained that there would have been no objection whatever to a proposal of Free Trade within the Empire, which the fiscal exigencies of the Dominions rendered out of the question. Revived effectively in 1902, the project became a living issue in the United Kingdom by the determination of Mr. Chamberlain, after his visit to South Africa in 1903, to present it as the best policy

[1] See an article in *The Nineteenth Century*, October, 1891, and a further explanation in the same journal of April, 1892; reprinted in *Recollections of Sixty Years*, pp. 256–98.

for the ultimate federation of the Empire. It is perfectly clear from his speech on Imperial Federation, delivered to the Unionists of West Birmingham on May 15, 1903, that the ground of his support of Preference was the belief that only thus could the growing nations oversea, which by that time had already a quarter of the population of the United Kingdom, be induced to unite in due course in a federal union. He laid stress on the fact that in the South African War over 30,000 Colonial troops had at one time or other taken part in the conflict, but that the pecuniary burdens of the struggle had been borne in far too high a measure by the Imperial Government. It was in the extreme desirable that any opportunity for the Colonies to show their readiness to be helpful to the Motherland should be reciprocated: the principle of Preference had been agreed to by Australia, New Zealand, South Africa, and Canada had carried it into effect for years. Germany was now penalizing Canadian imports. It was surely not a true interpretation of the doctrine of Free Trade, which he himself held, believing that the aim should be to increase trade and make its movement more and more free, to lay down that nothing could be done to assist Canada, either directly or indirectly, by inducing Germany to abandon her hostile attitude.

The proposal for a revision of the conception of Free Trade in the interest of Imperial unity was gradually accepted by the Unionist Party, and by other members of that party was developed into a full-grown theory of Protection as being desirable in itself for the benefit of the United Kingdom, a conception which, of course, is not completely to be made consistent with the doctrine of Imperial Preference. The chief attack of the Liberal Party in the period from 1903 to 1905 was directed against the principle of Protection; and the principle of Colonial Preference was assailed in the main either because in theory it was contrary to the rules of Free Trade, or more often because, without a violation of the fiscal system of the country by the imposition of new taxes simply for the purpose of remission in favour of the Dominions, no effective preference could be given. The position of Mr

Chamberlain in his proposals had been rendered much more difficult by the fact that without his knowledge or concurrence the registration duty on wheat, imposed for revenue purposes during the South African War, with which he had proposed to operate in favour of the Dominions, was repealed by Mr. Ritchie as Chancellor of the Exchequer. The subject of course led itself to indefinite numbers of difficulties and doubts, but the main argument which was effective in the country was undoubtedly the view that, unless the price of food was increased, there would be no return of an increased price to farmers in Canada, and therefore no obvious benefit to the Dominion, while, if the price were to be increased, it would press most heavily on the very poor classes of the population, who were very much worse off in every way than the farmers from whom an increased price was asked. On the other side it was argued that, without any actual increase of price, the imposition of a differential duty on wheat against the foreign imports would result in an increased supply being obtained from the Dominions, which would enable the maintenance of a large population, and it was pointed out that the increase of population in the Dominions was a matter of great Imperial importance. At the same time it was suggested that there could be no expectation of the retention of the Colonial preferences accorded by the Colonies if there was to be no reciprocity. To these arguments it was replied that the mere aggregation of population in a Dominion was not desirable, that quality was important,[1] and that Canada, in her indiscriminating readiness to take in any kind of men, was adopting a less wise policy than Australia, even if the latter might go rather far in her exclusiveness, when it was applied to keep out men whose only fault was that they had taken the ordinary precaution to secure an engagement before they proceeded to the Commonwealth, as in the famous case of the Six Hatters, which cast just ridicule on the Commonwealth Government. As regards the withdrawal of the Colonial preferences, it was pointed out

[1] Cf. Mitchell, *Western Canada before the War*, pp. 133 seq., and the reports there cited.

that the preferences were really advantageous in their ow
way to the people of the Dominions, as they formed a co
venient method of obviating the very high prices which th
duties caused consumers to pay.[1] Moreover, the preferenc
was some recognition of the great services rendered to th
Dominions by the Imperial Government in regard to pr
tection of trade, the foreign services, diplomatic and co
sular, and naval defence generally.

It is probably now possible to look at these matters i
a more dispassionate light than was conceivable at the tim
when the matters had been turned into questions of part
politics. It would be idle to deny now that the question
securing the union of the Empire by commercial means
not of the highest importance: it was made a party issu
in connexion with the Colonial Conference of 1907, mainl
through the fiery eloquence of Mr. Deakin, who in 190
secured a satisfactory grant of British preference, on th
line of the established Commonwealth and Colonial doctri
that no such preference can ever be given as will hamper th
development of any Dominion industry. It is important
realize that this principle lies at the bottom of all the pr
ferences accorded: the Dominions are not prepared f
a moment to accept the doctrine suggested by Mr. Chambe
lain that, while protecting already existing industries, th
Dominions should refrain from protecting industries not y
established, in return for a protection for their agricultur
and pastoral products in the United Kingdom. Mo
Dominion statesmen are not so unwise as to adopt the la
guage of Sir W. Lyne, Mr. Deakin's colleague, that th
importer is a nuisance,[2] who ought to be abolished, but ea
Dominion feels that it is a legitimate part of its national li
to make itself as self-supporting in every way as possibl
The work of the Commonwealth Parliament has largely co
sisted in considering applications for increases of tariffs, an
modifications of tariffs in order to protect new industries,
further to protect old industries, and the policy of the Co

[1] A view widely held by the farmers of Canada.

[2] Cf. *Canadian Annual Review*, 1913, pp. 296 seq.

monwealth, of New Zealand, and of Canada has been always the same, that, on a case being made out for protection by reason of inability to compete with imported goods, duties will be imposed or bounties given on local production, or both methods will be resorted to. It would be idle to criticize the policy of the Dominions in this regard. Whatever may be thought of the policy which originally set the Dominions on the path of protective tariffs, it would probably be absurd to try to leave that path in any abrupt way, and it must be left for the future to show whether the Dominions will follow the example of the United States, and finally themselves of their own free will lower their tariffs. New South Wales has never been satisfied that the tariff policy is as satisfactory as Victoria believes it to be. In Canada the movement for lower tariffs is a very important one,[1] and the value of the British preference there as breaking down excessive tariff bars is shown by the solidarity of the whole of the west and of much of the east itself in the demand that it shall not be touched if it cannot be increased. In this case at least there can be no question of the voluntary character of the preference or pressure for its reciprocation. In the Union of South Africa, on the other hand, while the tariff preference has not been withdrawn, the proposal was mooted as suitable for discussion[2] at the Imperial Conference of 1911, that the tariff preference might be replaced by a payment made by the Union for purposes of defence, but the Government withdrew this proposal before it was finally placed on the agenda of the Conference. The value of the preference in the case of South Africa has beyond all doubt been considerable, and its withdrawal would be a matter for regret, but reciprocity in any effective way is practically impossible in the special case of the nature of Union products.

From the point of view of the United Kingdom the policy of Colonial Preference and Protection generally must now be considered in the main simply in relation to the advantages to be derived in the United Kingdom. The obvious fact that the Dominions do not need eleemosynary aid renders it

[1] Cf. Ibid.

[2] *Parl. Pap.*, Cd. 5513, pp. 15, 16.

unnecessary to consider the question as one of support for feeble dependencies, like the West Indies, and due importance must be attached to the fact that the Dominions in their policy simply consider, and no doubt rightly consider, their own interest as the determining point in the matter. The situation is not rendered any easier by the European War: it is certain that on the conclusion of that war it will be necessary for every consideration to be given to the wishes of Russia, of Japan, of France and Italy and of other countries for closer commercial intercourse in order to strengthen the economic bonds among the Allies of the War, and this fact will doubtless not render Imperial Preference less difficult. But the important fact, in the meantime, is that the question of fiscal relations is no longer the point of most concern in the connexion between the United Kingdom and the Dominions, the centre of gravity of these relations having shifted from trade to foreign affairs. It is now practically certain from the drift of political feeling that, if the United Kingdom alters its fiscal system, it will be in the direction not of mere Imperial Preference intended to consolidate the Empire, but of preferential trade primarily aimed at the strengthening of the trade of the United Kingdom, and Imperial Preference will play a subordinate part. The matter therefore becomes one of economic theory rather than of constitutional politics.[1]

One obvious means of communication between the Dominions and the Imperial Government, available at all times without difficulty, presents itself, and it is not surprising that the question should have been frequently raised why it is not more regularly used. The Colonies have representatives in London, High Commissioners for the four great Dominions, Agents-General for the Australian States: why should not their services be availed of as a means of keeping each Government in the Empire in touch with the Imperial Government? The fact is, however, beyond dispute that this mode of procedure has never been adopted in any con

[1] My colleague, Prof. J. Shield Nicholson's work, *A Project of Empire* is the best presentation of the case of Imperial trade relations.

sistent way. The best case of a High Commissioner who was in close touch with his own Government and with the Imperial Government is perhaps that of Sir Charles Tupper during his tenure of the High Commissionership for Canada: he was so closely united in sentiment with his Government, and was in such harmony with it, that he actually for a period left his High Commissionership in order to lend his colleagues aid in an electoral campaign, and to act as their representative in connexion with the negotiations with the United States over the abortive Treaty of Washington of 1888.[1] Further, he was asked to stand for the leadership of the party on more than one occasion, and finally was induced to take up that post in the last days of the Conservative Ministry, a position in which he made a gallant fight for his party. Moreover, when High Commissioner, he was engaged in various negotiations under the aegis of the British Government, and, as plenipotentiary, arranged and signed, with the British Ambassador, the first Convention in 1893 regarding the trade between Canada and France. He was also entrusted by his Government with urging on the Imperial Government their plans for the development of a swift steamship service between Canada and England, and the establishment of the Pacific Cable, and he was a protagonist in the movement for the repeal of the restrictions on the grant of preference by the Dominions to the Mother Country through the denunciation of the treaties of 1862 and 1865 with Belgium and the German Confederation. Yet it would be idle to say that he was at any time in close touch with the Imperial Government save for the specific purposes on which he was authorized to deal with that Government. Still less by far could this be said of the ordinary Agents-General of the Colonies. There is an interesting record of the failure of any scheme to make the Agents-General a council of advice in a memorandum dated February 24, 1885, by Sir J. Vogel,[2] then Colonial Treasurer of New Zealand. 'During the last eighteen months,' he wrote, 'the Mother Country

[1] See *Recollections of Sixty Years*, pp. 204 seq.

[2] *Parl. Pap.*, C. 4521.

has been considerably interested in those questions relatin
to the Pacific Islands which the Colonies of Australasia hav
regarded as possessing supreme importance. These Colonie
have been represented in the Mother Country by exceptio
ally able Agents-General, well fitted for any confidence H
Majesty's Government might deem it fitting to repose i
them. But yet they have in no sense been called int
council. That it has not been deemed expedient to associat
them in the negotiations that have been proceeding is pro
sufficient that a Board of Council or Board of Confidenti
Advice is not found desirable or workable. Had it bee
otherwise there probably never was a time during which t
Secretary of State would have been more inclined to su
a plan.' The truth of his opinion is undeniable, although t
alternative proposed by the writer, the election by t
Colonies of members to sit in the Imperial Parliament, n
exceeding twenty in number, if desired without the rig
to vote, was hardly a conceivable improvement on the pla
which he regarded as out of the question and proved to
a failure. Even the advent of the Commonwealth,
reducing the number of Agents-General to be taken in
discussion, since for most purposes of Imperial importa
the High Commissioner alone has power to represent
Commonwealth, has produced no alteration in the positi
as regards Australia. At the Imperial Conference in 19
a proposal was made indeed by New Zealand, which seem
intended to suggest that the High Commissioners should
altered in position and become a real part of the Impe
machinery of communication. It was proposed that
High Commissioners should become the sole channel
communication between the Imperial and the Domin
Governments, the Governors-General and Governors, h
ever, being given identical and simultaneous informati
that they should be invited to attend the meetings of
Committee of Imperial Defence when questions of na
or military oversea defence were under discussion, and t
they should be invited to consult with the Foreign Mini

[1] *Parl. Pap.*, Cd. 5513, p. 4; 5745, pp. 77–88, 92, 93.

on matters of foreign industrial, commercial, and social affairs in which the oversea Dominions were interested, and should keep their Governments informed. This proposal would clearly have turned the High Commissioners into important links of Empire, and have provided a way of keeping the Governments in touch with such parts of foreign affairs as were not directly political; but, whatever its merits, the scheme was not seriously advocated by its proposer, and the representatives of the other Dominions were quite clear that they had no intention of altering the status of their representative, one of the South African representatives at the Conference going out of his way to make it clear that the then High Commissioner had been selected because of his special commercial abilities, and not for political purposes. The curious fact in that case was that the High Commissioner, more nearly than any other representative of a Dominion Government since Sir C. Tupper, had fulfilled the ideal of keeping his Ministry in touch with Imperial affairs, and had been in the closest personal confidence of the Prime Minister of the Union.

The fact, of course, is that the proposal to make the High Commissioner a means of keeping in close touch with the Imperial Government offends against a fundamental constitutional principle. The Agents-General and the High Commissioners are Government officials who hold their office under Acts of Parliament for definite periods, and who cannot be easily removed from office by any Government. Further, this tenure is in no small measure due to the fact that it is the custom for the office to be held by a person who has held high political office in the Colony or Dominion, often in the case of the Australian Colonies by the late Prime Minister. But practically in every case the appointment is made from the ranks of the political supporters of the Ministry of the day, and, in default of a Prime Minister, then a minister who has social ambitions or who is too big to play a second part at home is dispatched to England. In the Dominions political parties, other than the Labour Party, have not the fixed character of the parties in the United

Kingdom, and a minister who has belonged to a party may find after his appointment that the party changes considerably in tone and character, and that in effect it is no longer in complete harmony with him: still more frequently the Ministry is succeeded by another Ministry of completely different political tendency. The test is very clear in the case of the Dominions proper: Canada was represented from 1896 to 1914 by Lord Strathcona,[1] who was a nominee of the Conservative Government, of which he had been a supporter in Parliament: his eminent financial abilities rendered his appointment one to which exception could not possibly be taken by Sir W. Laurier's Government when it came into office shortly after his appointment, but on the other hand it could not be expected that in any intimate matters the Government should give him the confidence which existed between his predecessor, Sir Charles Tupper, and the Conservative Ministries. Sir George Reid was an able politician if a man of no profound knowledge, great ability, or grasp of principles; but it was absurd to expect that the Labour Party in the Commonwealth, with which he had been at variance all his political life, on finding him in office as a legacy from their predecessors, should trust him with political information. Sir T. Mackenzie, as High Commissioner for New Zealand, stood precisely in the same position: it was desired to secure his departure from New Zealand in order to permit the due formation of the new Government of Mr. Massey, but between a Liberal and a Conservative Government no real harmony could be expected to exist.[2]

It is an agreeable peculiarity of High Commissioners to deem themselves in some sense not general agents, as the popular mind is liable to deem them, but persons charged with ambassadorial privileges, and this belief is rightly encouraged by the British Government in the sense that there are shown marks of courtesy and distinction appropriate to the functions which they think they hold. But the essential distinction between an Ambassador and a High Commi

[1] Sir C. Tupper, *Recollections of Sixty Years*, p. 309.

[2] *Parl. Pap.*, Cd. 6863, p. 116.

sioner lies in the fact that the former is a servant who is in the confidence of his Government, while the latter is not. It is open to the Imperial Government at any moment to remove an Ambassador from his office *in toto* or to put him elsewhere, and this is occasionally done on change of Ministry, but it is seldom necessary, for an Ambassador belongs to a class which is, in fact, strictly non-political in its views and action. The Imperial Government can therefore have the utmost assistance from its ambassadors, and can trust them in the fullest degree, but that cannot be the case with a man who is normally a politician, and is at least appointed by a political party on party grounds, and holds office independently of the new Government. Men of ambassadorial character would not be very easy to find in the Civil Service of the Dominions, which is, save in the cases of technical appointment, recruited from men of too inferior social and educational standing to develope the necessary qualities for ambassadorial functions.

But even if this difficulty were not so serious as it appears, and if in due course the Dominions could send men of the right class to represent them in this respect, there would still be difficulty in arriving at the fullest degree of intercommunication between the Governments. It must be remembered that the position is not merely that the Dominions wish information on questions of foreign affairs, but the Imperial Government desires to get into direct touch with the views of the Dominions. This could be done no doubt in some degree if the representatives of the Dominions in London were strict non-party men with permanent careers to look forward to and devoid of political ambitions of any kind; it might then be possible to induce their Governments to accord them full confidence in every regard. But the most effective manner is undoubtedly that laid down in the offer made by the Imperial Government to the Dominion Governments in the dispatch from Mr. Harcourt of December 10, 1912,[1] in which the definite suggestion was made that a Dominion minister might be sent to

[1] *Parl. Pap.*, Cd. 6560; above, pp. 323, 324.

London, where he would be available to represent the
Dominion on the Committee of Imperial Defence, in which
questions of foreign politics are considered in immediate
relation to the essential question of the defence of the
Empire as motived by these questions, where also he would
have free and full access to the Prime Minister, the Foreign
Secretary, and the Colonial Secretary on all questions of
Imperial policy.

It is important to note that the concession here offered
and ascertained to be satisfactory for the time being to
Sir R. Borden,[1] is a very great one, unprecedented in the
history of the Dominions. It is true that the assertion is
expressly made that the Committee of Imperial Defence is
a purely advisory committee, which could not become
under any circumstances a body deciding on policy, which
must remain the sole prerogative of the Cabinet, subject
to the control of the House of Commons. But this assertion
is obviously a mere statement of what is notorious: the
policy of the United Kingdom[2] must be guided by the
Cabinet, which is responsible to Parliament. It would be
impossible for any body which Parliament could not direct or
control to be responsible for or decide on policy, without the
disappearance of responsible government altogether, and
the position is understood in all the Dominions. But the
idea that a minister should reside in London and actually
be in constant intercourse with the Prime Minister and
Foreign Secretary is a novelty of the most pronounced
kind. It is perfectly true that the High Commissioners
and even Agents-General have occasionally had direct dis-
cussions with the Foreign Secretary or had interviews
with him in conjunction with the Colonial Secretary, and
that from quite early times, and the Prime Minister has
naturally often seen and talked with Dominion ministers;
but these are quite different things from a right to full and

[1] Canada *House of Commons Debates*, December 5, 1912.

[2] See Lord Kimberley's dispatch of June 12, 1894, and Mr. Chamberlain's
dispatch of May 27, 1903, in reply to Home Rule addresses from the
Dominion of Canada; *Parl. Pap.*, C. 3294, p. 4; Cd. 1697, p. 4

free access to both, that is a right, not to ask the Colonial Secretary to arrange an interview, but to ask for an interview direct and to discuss as an equal the affairs he wishes to discuss. Moreover, it is to be remembered that the discussion is not limited to foreign affairs: Mr. Borden's desire was that Canadian and other Dominion ministers who might be in London as members of the Committee of Imperial Defence should receive in confidence knowledge of the policy of the Imperial Government in foreign and other affairs. Further, foreign affairs include *par excellence* foreign political affairs, a point in which the scheme differs vitally from the abortive proposal of the Dominion of New Zealand at the Imperial Conference of 1911.

The Imperial Government offered to make the scheme different in any way any other Dominion liked to have it varied. It is a striking confirmation of the view that these Governments do not trust their High Commissioners, that not one of the Dominions suggested that they would like him to be placed in the position indicated. Canada had already shown that she was only prepared to use a minister in the post. Australia replied by asking for a full Imperial Conference; New Zealand and the Union of South Africa, not to mention Newfoundland, were not prepared to appoint resident ministers, holding that the existing means of co-operation were for the time adequate. The replies of the Dominions are most significant of the different stature of the Dominion of Canada as compared with the other Dominions, who may fairly be said to be in some degree still in the dependency stage of development, and even in Canada there was delay before the plan was made effective. The opportunity for this was given in 1914 by the death of Lord Strathcona, whereupon the Dominion Government sent in his place as their representative an honorary minister, Mr., now Sir, George Perley. This minister was not, however, to be High Commissioner,[1] but he was to perform the functions of the High Commissioner while fulfilling the

[1] He could not legally have been Minister and paid High Commissioner simultaneously; *Revised Statutes*, 1906, c. 10, s. 10.

duties of resident minister. Chance made his position in that respect of special importance, inasmuch as the outbreak of the war made his services as an intermediary between the Dominion and the Imperial Government specially valuable.

The appointment of a resident minister may be thought to be a diminution of the position of the Governor-General or Governor. But it would not be possible to make the Governor a channel of confidential communication in the sense in which a resident minister can serve. In the first place, the Governor is like a High Commissioner: he is appointed for a time, which is fixed at five or six years according as he pleases, and Governors are not changed on changes of the Imperial Government. He is therefore very often not at all in harmony with the views of the Imperial Government. In the second place, the Governor is very seldom well informed before the event of the intentions of his ministers, as, on the whole, Ministries appear to be reluctant to give him their confidence. But a really more serious objection is the fact that the Governor has different functions to perform than an intelligence agency: his duty is to represent the King as the head of the local Government and tc serve as the channel of formal communication between the local and the central Governments, and in the performance of these functions his duty is fulfilled. Or, in fact, just as in foreign politics, as experience in the European War has shown, direct discussion between ministers of the Crown is far more efficacious than any amount of communications through ambassadors, so in Imperial relations the direct intercourse of minister and minister is far preferable to any other form of communication.

It is, of course, obvious that the mode of communication adopted for the present by Canada is not a permanent settlement of the question of the relations of the Imperial Government and the Dominions as regards foreign affairs or anything else. But, while it leaves the responsibility of the United Kingdom untouched, it does secure an effective method by which the responsibility shall not be exercised

until it has been considered in what respect the decisions of the Imperial Government will affect the Dominions of the Crown. The Committee of Imperial Defence is essentially a body whose advice is of very great importance, even if its power is merely advisory: the Dominions cannot claim at present any share of responsibility, but the means of advising are surely of the greatest value.

But it is important to note that the principle has been carried a good deal further than this, for on his last visit in 1915[1] to the United Kingdom the Imperial Government took the further step of inviting Sir R. Borden to attend a meeting of the cabinet. As a Privy Councillor, the Prime Minister of Canada has, of course, attended council meetings, as have many of his predecessors in colonial office and authority, but the attendance of a cabinet by a Dominion minister is totally without precedent in the history of the Empire, and its significance was duly noted at the time. It is a privilege not even accorded to Lord Onslow when acting in lieu of the Secretary of State during the visit of Mr. Chamberlain to the South African colonies: when his opinion was desired on colonial matters it could not be given and discussed by him in cabinet, but only to some members of the Government, who could repeat it in cabinet. As in the case of the attendance of Dominion ministers at the Committee of Imperial Defence, it connotes no responsibility on the Dominion minister, but it does most emphatically permit him to set out in the most effective manner his opinion on questions of importance to the Dominion.

Now it would be idle to suppose that any such practice as that followed by Sir Robert Borden can at once be accepted by the other Dominions. There is one good reason for this at least, in the reluctance of any Dominion to imitate another. But there is a more valid reason in the difficulty of providing as easily, as in the case of Canada, for a resident minister even for a period of the year. The

[1] See *Times*, July 15, 1915. Mr. Hughes was sworn of the Canadian Privy Council, and sat at an Imperial Cabinet meeting on March 9, 1916.

Governments of the Commonwealth have seldom bee
strong enough to provide a minister who could be allowe
to leave the country for long periods while still remainin
a minister, and the state of New Zealand since the fall
Sir J. Ward from power in 1912 to the autumn of 191
was such that a single vote could never have been spare
In the case of South Africa, and doubtless too in the oth
cases, considerations of effective touch with the abse
minister would have weight, and also, but mainly in t
case of the Union, fear lest in some way the Dominio
should be dragged willy nilly into the vortex of Imperi
policies. This fear of the power of the United Kingdo
and nervous desire not to approach too closely the brillian
of its Government, are characteristic of the childhood of stat
and it will, it may be believed, disappear with growi
consciousness of strength as it has disappeared in Cana
but the difficulties of sparing ministers, the lack of stabili
of governments, and the distance will make progress, it m
well be, slower in the case of the other Dominions, wh
Newfoundland naturally realizes that in such case for her
send a resident minister would be unwise and unnecessar

But even if the full programme of a resident minis
cannot be carried out, there may be possibilities in
way of giving increased power to a resident High C
missioner,[1] especially in the case of the Labour Party
the Commonwealth, where the Government counts
little in the political world in comparison with the Lab
Party caucus and the labour organizations behind
caucus. The appointment of a labour minister to succ
Sir G. Reid as the High Commissioner will for a time k
the Government and High Commissioner in unity of thou
but apart from changes of Government, it is doubtfu

[1] The Colonial Secretary in 1907 endeavoured to encourage the
the High Commissioner in connexion with the secretariat of the Confe
(*Parl. Pap.*, Cd. 3795, p. 4), but the Commonwealth and the other G
ments remained indifferent. Indeed the whole history of the recent
of efforts to use High Commissioners has been one of reluctance o
part of the ministries who are sensitive of their personal position.

this unity can long prevail. The representative in London of a Dominion is always a potential rival for power at home, a fact which adds to the difficulties inherent in securing close harmony of action.

It is creditable to the intelligence of Sir C. Tupper that as far back as 1891 he saw quite clearly that the only possibility of establishing a Council of advice would rest on the sending of ministers, not officials, to represent the Government of the Dominions. More attention might perhaps have been given to his advice at that time, had it not been adverse to the established idea then prevailing that some form of federation might be worked out, and had it not been bound up with the idea of preferential trade in some form or other. Nor doubtless was the idea anything but premature, since it has clearly been seen at the present day that the Dominions generally have not been able to accustom themselves to the conception.

It is fairly clear from the replies[1] of Australia, New Zealand, and the Union of South Africa to the offer of the Imperial Government, that these Dominions think that the machinery of the Imperial Conference, plus arrangements for individual ministerial visits, cover adequately the whole ground of the needs of the day. It is important in this connexion, however, to remember that Mr. Fisher, when Prime Minister of the Commonwealth, was a declared believer in biennial or even annual conferences, and that his belief was founded on the need of keeping in close touch with the Imperial Government regarding foreign affairs. This was shown very clearly at the Imperial Conference of 1911 when he made the suggestion that the affairs of the self-governing Dominions might be transferred from the ministerial control of the Colonial Secretary to that of the Foreign Secretary. It was abundantly evident that his desire was to be *au fait* with the progress of the foreign relations of the Empire, and for that purpose he valued the holding of conferences. In this attitude he recognized the fundamental truth that by far the most important subject of the

[1] See above, Part I, chap. xv, § 3.

Conference of 1911 was the one not recorded in the offici
proceedings, the attendance of ministers at the Committe
of Imperial Defence to hear an exposition of the foreig
policy of the Empire and the situation of affairs from th
Secretary of State for Foreign Affairs.[1] But it is perfectl
clear that annual conferences for this purpose are a clums
means of procedure, and that the attendance of an individu
minister for a short time would be more simple and mo
effective. But this policy would have parliamentary di
advantages which cannot be ignored. The departure
one minister would be often inconvenient as Parliame
could not reasonably be asked to suspend operations for th
cause, while an Imperial Conference gives a good exc
for three ministers or even more taking a journey to t
centre of the Empire, where they can mix agreeably t
utile with the *dulce*. Nor has the demand for more frequ
conferences any real chance of obtaining general ass
at present, considerations of ministerial convenience be
conclusive.[2]

The Imperial Conference must, therefore, be regar
not so much as a means of solving the fundamental probl
of the grant to the Dominions of a share in the managem
of the external affairs of the Empire in return for th
efforts to take part in its defence, but as a means of p
viding for the discussion of matters of common inter
on the basis of absolute autonomy and equality, o
strivings in that direction. It is undoubtedly true tha
regards a good deal of the work which has come be
Imperial Conferences the subject matter might quite
well have been treated by international conferences, s
it has nothing specifically imperial connected with
There are obvious examples of such cases in subjects
copyright, trade marks, patents, workmen's compensat
international exhibitions, mutual provisions for dese
wives and children, cheaper cable rates, universal p
postage, and so forth. Other matters are more truly Impe

[1] *Parl. Pap.*, Cd. 5745, p. 440; Gen. Botha, *Times*, June 22, 191

[2] *Round Table*, 1915, pp. 670, 671, 700.

but they all fall under the head rather of questions requiring legislation in the Empire than of matters of policy for executive decision. Nor is it unnatural that this should be the case: it is very seldom that any executive matter can conveniently be decided by discussion at a conference composed of persons, who have not been in contact with the questions from which the matter requiring decision arose. There is a very obvious instance in the case of the Conference of 1911. The Conference, after hearing the arguments of the Foreign Secretary in favour of the ratification of the Declaration of London, agreed to recommend its ratification. Australia abstaining on a technical point, but not denying the wisdom of the course. Fortunately, the attempt to pass off this discussion as the considered opinion of the Dominions was not taken seriously by the House of Lords, which threw out the Bill on which ratification depended, and they did thus incidentally a great service to the international position of the Empire in the European war. But the important point to note is that the Dominion ministers from lack of familiarity with the practical aspects of the matter at issue were hopelessly incompetent to deal with the position in the form of a set conference.[1] Their ammunition of arguments had been picked up from representations made at the time by miscellaneous private bodies, and they were wholly unable to see, before they were pointed out, the fallacies in the arguments which they adduced, or what was far more important to realize that the arguments of the Foreign Secretary, while valid against their own errors, were not conclusive of the main issues at all. It may safely be predicted that, if the Dominion representatives are to have only such control of or intelligence of foreign politics in their relation to the Empire as they can pick up once in four years at a very much overcrowded conference, they are not likely to benefit the Empire very seriously by their advice. Nothing but the close following of the trend of politics abroad can be useful to a Government, and since 1911 only the Government of Canada has

[1] *Parl. Pap.*, Cd. 5745, pp. 97–134.

been effectively in touch for any considerable period w
the Imperial Government, though in 1912 both Colo
Allen of New Zealand and General Smuts of the Un
were at home, and in touch with the Committee of Impe
Defence.

Everything at present indeed tends to show that
Committee of Imperial Defence will develop as a m
for the time being of assisting the appreciation of fore
affairs by the Dominions; apart from the question of
presence of a resident minister, the Dominions all hear
agree in the desirability of the use of the Committee, thou
Australia's position is less clear than that of the ot
Dominions. The Committee has, of course, no legal c
stitution or powers: it is a creation of Mr. Balfou
devised to study defence problems in close relation to fore
politics, and the Prime Minister remains the only absolut
essential member of it, though the Ministers of War,
Admiralty and Foreign Affairs, with the Chancellor of
Exchequer are immediately concerned in all its delibe
tions. The elasticity of its composition is best seen in
extraordinary varying ways in which its meetings
composed from time to time as there may be need. Exc
tion has of late frequently been taken to its appar
usurpation of the powers of the Imperial Conference,
this attack is due to an error and misunderstanding of
position. The position of the Imperial Conference is t
it is a gathering of ministers fully empowered to repres
the Dominions for which they speak, though subject
course to the control of the Dominion Parliaments, w
in what they say and undertake, express the views of th
Dominions on subjects which fall under their cont
whether it be a mere question of alteration of law for
sake of uniformity, or a request to the Imperial Gove
ment to alter taxation, such as double income tax, affe
ing the Dominions. In the case of the discussions conduc
at the Committee of Imperial Defence, ministers are
in a position to advise: they are present to receive inform
tion, and to make, if need be, suggestions for the conside

tion of the Imperial Government in the interest of the Dominions which they represent. The decision and the action taken rest on the responsibility of the Imperial Government: the essential condition of secrecy renders it impossible for ministers of the Dominions to take responsibility to the Dominions even for their advice, and of course, as they do not control, they cannot ever take responsibility for the action determined upon. In those cases in regard to foreign affairs, where the Dominions can give advice and take responsibility for that advice, the proceedings take place at the Imperial Conference, as in 1907 in the case of the question of the New Hebrides and Newfoundland, and in 1911 in the case of the Declaration of London. In effect the distinction of treatment corresponds to a vital distinction of fact, and it is to be noted that, while the details of the naval and admiralty questions raised at the Conference of 1911 were thrashed out in conferences with the War Office and the Admiralty, the results of these conferences were formally submitted to the Imperial Conference, and adopted by it as its own,[1] thus placing them on the responsibility of the ministers of Canada and Australia in respect to the arrangements regarding these Dominions as to naval defence, and on these and the other Dominions as regards military defence. The distinction between the Conference and the Committee further appears in the fact that at the Committee, which is merely advisory, officers of the Army and Navy may be present, including officers of the Dominions, while the Imperial Conference is a conference strictly confined to persons of ministerial rank and responsibility, the structure of the Conference reflecting its special importance.

The nature of the Imperial Conference is now determined by the resolution passed in the Conference of 1907[2] to the effect that, 'it will be to the advantage of the Empire if a conference, to be called the Imperial Conference, is held every four years, at which questions of common interest may be discussed and considered as between His Majesty's

[1] *Parl. Pap.*, Cd. 5745, p. 432. [2] *Parl. Pap.*, Cd. 3523, p. 5.

Government and the governments of the self-governi
Dominions beyond the seas. The Prime Minister of t
United Kingdom will be *ex officio* president, and the Pri
Ministers of the self-governing Dominions *ex officio* minist
of the Conference. The Secretary of State for the Colon
will be an *ex officio* member of the Conference, and w
take the chair in the absence of the President. He w
arrange for such Imperial Conferences after communicati
with the Prime Ministers of the respective Dominio
The Conference of 1897 was confined to Prime Minist
only, advantage being taken of the Jubilee celebrations
Queen Victoria's reign to consult with them, but ot
ministers appeared informally at the Conference of 19
held together with the coronation, and the demand for
recognition of these ministers as full members raised
Canada in 1905[1] was conceded in 1907, it being agreed th
'such other ministers as the respective governments m
appoint will also be members of the conference, it be
understood that, except by special permission of the c
ference each discussion will be conducted by not m
than two representatives from each government, and t
each government will have only one vote.' In point
fact in 1911 each Dominion sent three representativ
except Newfoundland and New Zealand, which had t
The delegates and their families and staffs were the gu
of the Imperial Government, and the ministers brou
with them some specially important officers from th
civil service.

The most obvious omission in the construction of
conference is that of India, and it is clear that the omi
is undesirable. The fact that India can be represen
occasionally by the Secretary of State for India, in
case of 1911, rendered the absence of an Indian re
sentative unobjectionable, since Lord Crewe had but rece
left the Colonial for the India Office, but the accidental
that he was then the best representative India could
had does not alter the fact that India has established

[1] *Parl. Pap.*, Cd. 3340, pp. 3, 4, 10, 12.

her service in the war a claim to be included in any Imperial conference, and that her omission was never justified. The demand of the Legislative Council of India [1] that this claim should be conceded has been promised the earnest consideration of the Imperial Government, and, though it doubtless lies on the Conference to alter its own constitution, it is clear that the Dominion Governments should be pressed if necessary to agree to this step before the next formal and full conference is summoned. It is quite impossible to accept the validity of the argument of Lord Elgin in 1906 [2] that the constitution of the conference cannot be changed save by a resolution of the conference. It can, it is clear, be changed by agreement between the Imperial and the Dominion Governments, and such agreement should be secured forthwith.

The functions attributed to the conference have hitherto been rather inadequately considered. It is clear that it is desirable that the subjects dealt with should be limited to those which can effectively be considered and disposed of by a conference of ministers. The tendency to bring before the conference trifling and ludicrous points, is one which can hardly be regarded as conducing to the dignity of the conference or the swift and satisfactory conduct of business. Nor is there any useful purpose served by bringing before the conference matters which depend on detail for their importance, for these questions are far better suited to form the subject of separate discussions, as is recognized in the resolution of 1907, which expressly says that 'upon matters of importance requiring consultation between two or more governments which cannot conveniently be postponed until the next conference or involving subjects of a minor character or such as call for detailed consideration subsidiary conferences should be held between representatives of the governments concerned, especially chosen for the purpose.' Of conferences of this type there have been three, the naval and military of 1909, which was

[1] *Times*, Sept. 24, 1915; *Round Table*, 1915–16, pp. 88–119.

[2] *Parl. Pap.*, Cd. 3340, p. 13, a singularly unconvincing dispatch.

a matter of urgency, and required technical investigation, the Copyright of 1910,[2] and the Surveyors' of 1911,[3] both purely technical conferences.

Another salutary rule in regard to the conference should be that nothing should be referred to a conference which can better be effected by writing, and that every effort should be made to present for discussion only such questions as admit of a clear decision being arrived at by ministers, or in the alternative questions of such importance that discussion at a public conference is likely to aid in some result, nor on the whole does it seem worth while to summon a conference of Prime Ministers and others for the mere sake of passing resolutions which are purely platitudinous.

Judged by these not very exacting standards, the resolutions and discussions of 1911 must be held to have contained a good deal of waste matter. The Imperial Government cannot be considered exempt from blame: they proposed to discuss in this formal manner the subject of a uniform design of stamps for the Empire, a proposal which was so outrageously absurd that it fortunately does not appear to have been pressed, the arrangements for the expulsion of undesirable aliens, and labour exchanges in their relation to the Dominions. The question of expulsion of undesirable aliens was briefly treated; it is obvious that it was merely one for departmental correspondence. The question of labour exchanges and the Dominions was discussed, but the discussion, though interesting from the point of view of statistics of emigration work, was rendered futile by the obvious fact that the emigration to the Australian States is conducted by the Governments of the States which have been denied, despite their protests, a place in the Imperial Conference. This exclusion, which was probably accidental rather than intentional in 1902, was deliberately carried out in 1907[4] against the protests of the States but with the desire of the Commonwealth Government

[1] *Parl. Pap.*, Cd. 4948.
[2] *Parl. Pap.*, Cd. 5272.
[3] *Parl. Pap.*, Cd. 5776.
[4] *Parl. Pap.*, Cd. 3340; 3523, pp. 92

The discussion is of importance in its bearing on the relative positions of the Commonwealth and the States, the Commonwealth being described by one of the States as merely an agent of the States for certain defined purposes, while the Commonwealth insisted that apart from her specific powers she alone should properly represent Australia. The decision had, of course, to be in favour of the Commonwealth, but the exclusion of the States is an additional reason for deprecating the insertion of resolutions or attempts at resolutions which the Commonwealth had no power to effect, and the same line of reasoning applied in several cases to Canada.

Other resolutions offended against other canons. One in favour of Imperial postal orders being introduced in Australia and fully adopted in Canada, was in the first place improper as referring to two Dominions only; in the second place it was clearly a matter for departmental treatment; and in the third place the attempt to bring pressure to bear by having a conference resolution passed was resented, and the provisional assents of the representatives of Australia and Canada resulted in no action. Not in themselves open to criticism, but idle as merely general, were the recommendations of cheaper cable rates, a state-owned Atlantic cable, if rates were not soon lowered, and an Imperial wireless telegraphy chain, which was fated to lead the Imperial Government into serious troubles and to be unfinished when war broke out, and universal penny postage. On the latter resolution no action could be or was taken; the Imperial Government declined to agree to a state-owned Atlantic cable, which New Zealand and Australia still wanted, and Canada adopted a radio-telegraphic system of its own, and so becoming indifferent to the old proposal. On the other hand, cheaper rates were conceded, but the Imperial post office hardly needed the aid of the conference to obtain them, as the companies interested had found their hands forced by other considerations.

Of the same useless character were the resolutions in favour of a steamship service between Canada or Newfound-

land and the United Kingdom and between Australia a
New Zealand and Canada, and the pious declaration th
concerted action should be taken to improve trade a
postal communications within the Empire and to d
courage combines for the control of freight rates, in so
as these combines injured trade. The first of the t
merely readopted the old theory of an 'All Red Rout
mooted in 1907 and found impracticable at any reasona
rate; the second obviously meant nothing, and left Sou
Africa, which raised the matter, to remove her own troub
by passing an Act[1] which threatened such severe
crimination of all sorts against lines which gave rebat
that Messrs. Donald Currie & Co. retired from the mana
ment of the Union Castle Line of Steamships, and left it
Sir Owen Philipps, who managed to make a contract w
the Union on more or less satisfactory terms, though
has been accused of contravention of the Act also. Wis
the eternal question of trade relations was referred
a Dominion Royal Commission to report upon the natu
resources of the different parts of the Empire represen
at the conference, the development attained and attaina
and the facilities for production, manufacture, and
tribution, the trade of each part with the others and w
the outside world, the food and raw material requirem
of each, and the sources thereof available, to what ex
if any the trade between each of the different parts
been affected by existing legislation in each, either b
ficially or otherwise, and by what methods, consistent w
the existing fiscal policy of each part, the trade of each
with the others might be improved and extended.
question of uniformity in the law of alien immigration
referred by the conference to this Commission, but
Commissioners have not dealt with it at all, and, as
obviously a matter of high politics and not really a
mercial question, it is perfectly clear that it should not
been referred to the Commission, and that its refer
was simply due to the fact that the conference desire

[1] No. 10 of 1911; *Parl. Pap.*, Cd. 6091. pp. 61, 62

avoid touching on any point on which differences of opinion could arise. It would be idle to censure the conference for this decision: it is much more useful to discuss matters upon which something can be agreed than to deal with problems that are insoluble, and, what is more important, so different in each case that a general discussion would not be of any value. In point of fact all that could usefully be said on the subject would have been the obvious remark that every consideration must be shown for the feelings of Japan.

The Commission appointed by the desires of the conference has taken its duties seriously, has visited Australia and New Zealand, South Africa, Newfoundland, and a small part of Canada, but through the war the Australian Government has recalled its member, and the completion of its work seems likely to be delayed until its report is very much out of date as regards the evidence on which it is based. On the other hand it has recorded much interesting matter about the Dominions it has visited.[1] The serious doubt must arise whether any useful service has been rendered by these visits and records beyond the undoubted convenience of saving the governments concerned a repetition of the long wrangle of 1907, when Mr. Deakin tried to prove to a government, which had won an enormous majority on its free trade principles, that it ought to be protectionist, and while that Government explained to Mr. Deakin that his economic views were unsound.

The other resolutions on industrial subjects were all of no real value. Fortunately, the Dominions represented realized the fact and wasted no time on their discussion. Accordingly it was agreed at once that uniformity in the law of trade-marks, copyright, patents, and companies was desirable, and also that uniformity of the law of accident compensation should be aimed at. On two of these topics, company law and accident compensation law, the Dominion of Canada and the Commonwealth had but little legislative

[1] *Parl. Pap.* Cd. 6515–17, 7170–2, 7173, 7210, 7706, 7707, 7710, 7711, 7898, 7971, 8125.

authority, and therefore their agreement was negligi
The Commonwealth, however, improved in 1912 its tra
mark law and adopted the Imperial Copyright Act of 19
as it had arranged to do at the Conference on Copyright
1910. New Zealand also in 1911 improved its law of pate
and trade-marks, and in 1913 fell into line as to copyrig
Newfoundland, in 1912, accepted the Copyright Act. T
Commonwealth also legislated as to compensation to sea
in 1911, and in reference to workmen employed by
Commonwealth in 1912. But the needlessness of a c
ference for such an end was seen by the fact that the p
vinces of Manitoba and Nova Scotia in 1913 consented
follow the British model in certain respects, and if N
Zealand legislated in 1911 by Act No. 34 on the mat
as a result of the conference, South Australia, West
Australia, and Victoria were induced to act by mere co
spondence, though in the latter case a different syst
from the Imperial was preferred by the Upper Hou
Ontario, on the other hand, decided to adopt the Gern
model as better suited to the case of the province wh
it was difficult on the English basis to secure that a wo
man would have an effective means of securing paym
of compensation from his employer owing to the shift
character of the population.

Another resolution which clearly depended on circu
stances beyond the control of the Dominion or the Comm
wealth was a resolution in favour of the mutual recognit
of judgements and arbitral awards issued by the co
of the Empire. Necessarily the matter is one for co
spondence, with no great prospect of early legislat
especially as it involves legislation everywhere in
Empire. It may be doubted if facile endorsements
general principles without understanding what is invol
serves any useful purpose, and legal questions are singul
unsuitable for discussion when they deal with mere po
of detail.

The serious resolutions which alone would properly h
been brought before the conference reduce themselves

a few only, dealing in the main with constitutional matters. The Dominions of Canada and New Zealand asked for wider powers in merchant shipping legislation, but were refused what they asked: the Union, the Commonwealth, and Newfoundland held that the powers already existed, which was absurd, as the Commonwealth had to admit in 1912, and the Imperial Government held that the powers should not be conceded as they were desired to exclude lascars from the shipping trade. A general resolution as to encouraging British shipping possessed some importance as suggesting that steps be taken to deal with unfair competition by foreign subsidized vessels, thus giving the Commonwealth approval for her determination to close her coasting trade to such vessels. A resolution in favour of reduction of the Suez Canal dues was really a request to the Imperial Government to use its powers with the Suez Canal Company to reduce its dividends in the interest of the Dominion shipping, and was accepted by the Imperial Government in that sense. More important still were the resolutions regarding the future consultation of the Dominions as to international treaties such as the Hague Conventions, and the agreement that the Declaration of London should be ratified, while it was agreed to continue the efforts of the Imperial Government begun in 1907 to secure liberty for the Dominions to cease to be affected by the older treaties applied to them before the practice of consulting the Dominions in treaty matters came into force. An agreement to consider the question of the attitude to be adopted in regard to international exhibitions led to a discussion with the Agents-General and High Commissioners of the Dominions and States as to the attitude to be adopted in the matter, the outcome of which was that the Dominions were not represented in any way at the Conference of Berlin in 1912, though of course the convention contained the usual provision for their adherence in due course if they desired.

One important subject was that of the Court of Appe[al] whose alteration in some minor respects was concurred in

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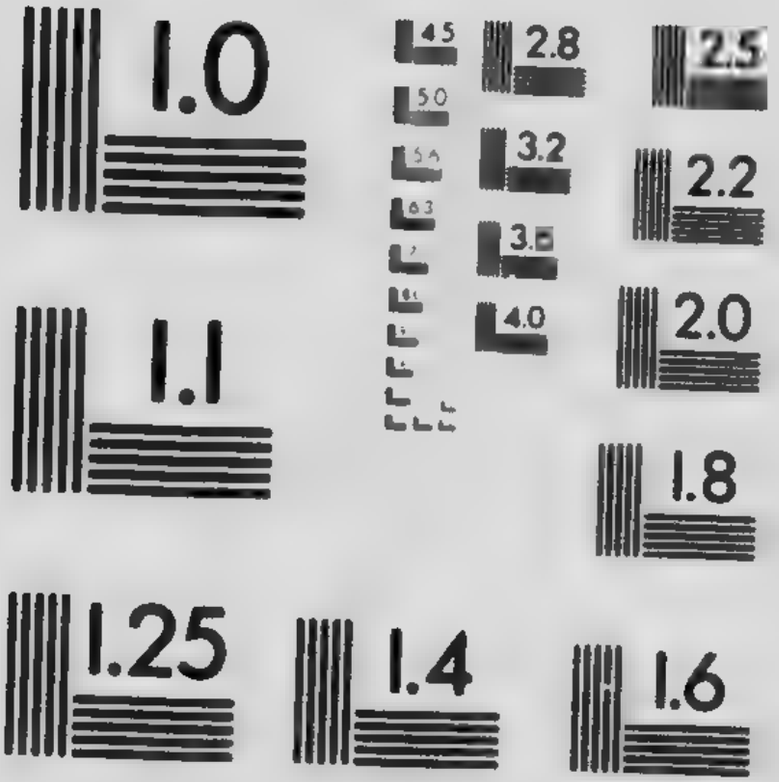

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after an elaborate and inconclusive discussion.[1] Naturali
tion was also discussed and progress made with its decisio
Emigration was touched upon in its general aspects, a
in close connexion with it a resolution arrived at in fav
of provision being made to secure that wife and ch
desertion by emigrants and others should be discourag
but the discussion of these topics was necessarily p
functory, as the matters were in the main questions
State concern in Australia. An imperial aspect, howev
was given by the stress laid by the President of the Lo
Government Board on the fact that the process of emig
tion was lessening the population of Scotland, and wo
use up all the natural English increase unless the dea
rate had improved, a serious fact which at once rend
all schemes for emigration based on the theory of ov
crowding in the United Kingdom open to serious objecti

These resolutions with the unimportant additions of
urging—quite needlessly—the celebration of the Kin
birthday on June 3, the interchange of civil serva
visits by ministers, and the holding of a conference
subsidiary conference in an oversea Dominion exha
the list of serious business done, apart from the naval
military questions discussed only *pro forma* at the c
ference, and the secret proceedings at the Committee
Imperial Defence. It is clear that they could have b
dealt with in a good deal less than the twelve days wh
the conference lasted, and this is a matter of importance
it is not desirable that the length of the conferences sho
be so great as to make the attendance of ministers f
distant Dominions burdensome. It is of course true t
ten days is a brief period to give to consideration of
topics of a conference, but the ministers are natur
anxious to see as much as they can of the United Kingd
which many of them have few chances of visiting, and w
can study under more favourable auspices. The confer
straggled on from June 2–20, and it is clear that it wo
have been much better had it been confined within

[1] Part I, chap. xvi. [2] Part I, chap. xii.

limits of some ten days, as could easily have been done by dealing with the important topics alone.

There is a further unsatisfactory feature regarding the Conferences, the error of the commingling of Conference and festivities. It is perfectly natural that the ministers who come with their wives and families should eagerly take part in the lavish hospitality provided by all sorts of people, official and otherwise. Nor is it other than desirable that they should have this opportunity of seeing the life of the Empire at first hand. But the rule should clearly be that during the period of the Conference the ministers shall restrict themselves strictly to Conference work. It is neither profitable nor desirable that ministers should be unable to attend to the obvious business of correcting the accounts of their speeches which are to be published, because they are entertaining meetings of female suffrage supporters or having tea with duchesses. Nor should they be unable to attend meetings of the Conference at the proper time, or leave early because they have luncheon engagements. The custom of making the business of the Conference subservient to the pleasure of the ministers leads to the serious doubt whether the ministers regard the Conference as anything but an excellent opportunity for a visit to the United Kingdom, approved by the Opposition, and at the expense, when in the United Kingdom, of the Imperial Government, so that there can be none of those unpleasant questions which Opposition members love to put about the expense of the Prime Minister's 'trip to the old country'. Mr. Deakin in 1907 called attention to this anomaly by which entertainment is substituted for work, and it is to be regretted that neither the Dominion ministers nor their Parliaments have taken the hint. It is clear that it is not for the Imperial Government or for private hosts to refrain from offering their hospitality, and all that is required is that the Prime Ministers and their companions should lay it down definitely that for the time of the Conference, which should be reduced to the consideration of real business, they can accept no social engagements. The

work of the Conference would then be accomplished mo
quickly and with greater effect.

Consideration of the true functions of an Imperial Co
ference lead inevitably to the condemnation of the vario
plans for a permanent commission or secretariat, whi
have been mooted from time to time, and which seem
have a rather seductive effect for some minds. To so
extent the responsibility for the serious consideration
this idea seems to rest with Sir F. Pollock,[1] who, with Mr.
Drage, toured Canada in 1905 with a propaganda in fav
of the establishment of an Imperial Council with a perman
secretariat as a general intelligence department, findi
as might be expected, scant affection for any Council
any kind in the most sensitive of Dominions. The p
appeared in an official form in a proposal made by
Lyttelton on April 20, 1905, to the Governments of the
governing Dominions.[2] He then suggested that the Colo
Conference should be styled the Imperial Council, and
regarded as having a permanent constitution, the Secret
of State for the Colonies and the Prime Ministers of
Colonies being *ex officio* members, and that, during its per
of rest from its labours, its decisions should be entru
to a body which could examine and report upon quest
referred for such examination and report by the Cou
Moreover, there would also be the advantage that
a body would be available to carry out investigations
to report on such questions as the Imperial Governm
with one or more Colonial Governments might refer
for consideration and report, much as Royal Commis
and departmental committees considered matters for leg
tion by Parliament. The body would be appointed by
several Governments, who would pay the members,
would be able to add outside members for special purp
it would be provided by the Imperial Government
a secretarial staff, and it could often do the work
ad hoc conference, which was difficult and slow to con

[1] See J. S. Ewart, *Kingdom Papers*, ii. 214.

[2] *Parl. Pap.*, Cd. 2785.

The proposal was welcomed by the Governments of the Cape and of Natal, and also by the Commonwealth of Australia, but Canada, as usual, prognosticated evil, suggested that the term 'Council' might hint at the growth of an institution which would interfere with the autonomous legislative and administrative powers of the self-governing Colonies, and believed that the Commission might interfere with responsible government. The matter stood over for the Conference of 1907; Lord Elgin in the interim having intimated[1] that he did not share his predecessor's views, and the discussion at that Conference showed much divergence of opinion. Australia moved that 'it is desirable to establish an Imperial Council to consist of representatives of Great Britain and the self-governing Colonies chosen *ex officio* from their existing Administrations. That the objects of such Council shall be to discuss at regular conferences matters of common Imperial interest, and to establish a system by which members of the Council shall be kept informed during the periods between the conferences in regard to matters which have been or may be subjects for discussion. That there shall be a permanent secretarial staff charged with the duty of obtaining information for the use of the Council, of attending to the execution of its resolutions, and of conducting correspondence on matters relating to its affairs. That the expenses of such a staff shall be borne by the countries represented on the Council in proportion to their populations.' The discussion showed clearly that Mr. Deakin did not care as to the title, and the term 'Imperial Conference' was therefore agreed to. Nor did he wish, it turned out, to have a Commission of the type proposed by Mr. Lyttelton, which would apparently have been analogous to the Committee of Imperial Defence. But he did wish the secretariat to be created as a separate body, under the Prime Minister, composed of officials from the different Dominions, and paid for by the Dominions and the United Kingdom. But in his views Mr. Deakin found no sympathy from Sir W. Laurier and General

[1] *Parl. Pap.*, Cd. 2975.

Botha, and the Prime Minister, while agreeing to t
proposal of Sir J. Ward that he should become the Preside
of the Conference, was unable to agree to control the sta
which therefore, as Sir W. Laurier insisted on minister
control, had to be left to the control of the Secretary
State for the Colonies.

The actual steps taken by the Secretary of State w
to divide the office over which he presided into two divisio
the Crown Colony and the Dominions, and to name fi
four and later three officers of his staff in that division t
Secretariat of the Imperial Conference. For all practi
purposes the action taken ended at that point, exce
that the Secretary of State was moved to make a spec
in the House of Lords explaining his action and eulogiz
the abilities of the Colonial Office.[1] Mr. Deakin was
course wholly displeased at the result, but the ot
Dominions apparently thought that all they had wis
had been done. At the Conference of 1911,[2] however, th
was definitely put forward an idea which had been stron
pressed in England in 1910, and to which Lord Cr
seemed to have definitely pledged his concurrence, t
the Dominions department, including the secretariat, sho
be placed under the Prime Minister, this being propo
by the Union Government, while Sir J. Ward propo
that there should be two permanent Under-Secretaries
State for the Colonies, and that the Dominions departm
and the secretariat be amalgamated, and the Secretary
State change his title to Secretary of State for Impe
Affairs.

The discussion of these proposals at the Conference[3]
perfunctory. There was indeed no principle involved
the suggestions of Sir J. Ward, and his views were
pressed at all: the far more serious proposal that
Prime Minister should be the head of the Dominions dep
ment was dismissed by the assurance of the Prime Mini
that there would be in a year at least 1,000 papers w

[1] *Parl. Pap.*, Cd. 3795. [2] Ibid. 5513. [3] Ibid., 57

he had to see, and that he could not undertake the work. The change of title was rejected without hesitation, and the Colonial Office was left unchanged in any respect.

It may be doubted whether the argument used by the Prime Minister was very seriously intended: it was of course absurd to say that anything like 1,000 papers a year would have been seen by him, had he cared to undertake the work of controlling the secretariat, unless indeed he intended to take up the position of the permanent head of the department, which was hardly contemplated. In all probability the actual number of papers to be considered might have reached a tenth of the number mentioned. But there was a better reason than that adduced for the decision not to place the Dominions department under the Prime Minister, namely, that Mr. Harcourt had been the author of an extensive system of hospitality to the oversea representatives, which the Prime Minister could neither find time nor means to imitate. This difficulty, indeed, might have been surmounted by the device of allowing the Prime Minister the assistance in his work of the Chancellor of the Duchy or the Lord President of the Council, who are normally not overworked ministers and might be glad to have some occupation, while their high social rank renders them suitable for the office. For all practical purposes the result would, no doubt, be the same as at present, but the status of the Dominions is doubtless lowered in the eyes of thoughtful people by their being linked in the same office with the Crown Colonies, and the system of assuming that the knowledge of Crown Colony work is sufficient ground for employment on other work is an obvious absurdity, which explains all the serious errors made of recent years in dealing with the self-governing Dominions. Nor, of course, if it were really desired by the Dominions, would there be the slightest difficulty about the division of the Colonial Office, nor much extra cost, but the Imperial Government are clearly entitled to retain the *status quo* as long as the Dominions do not really much desire a change.

What is more important is to consider whether t
adoption of some plan for a secretariat would have a
better result than the existing system. It is important
note that it has not been alleged by any Dominion Gover
ment that the Dominions department of the Colonial Offi
has failed to carry out any action required by the Imper
Conference of 1911 or the Colonial Conference of 190
The action required of a secretariat is clearly that of cor
spondence, and while after the Conferences of 1897 a
1902, before the creation of the Dominions department, t
duty of correspondence was not very effectively carr
out, there has never been alleged by a Dominion Gove
ment any failure since the undertaking of the Colo
Secretary in 1907. Indeed, under the aegis of Sir Cha
Lucas the Dominions department went further, and
the years 1909–10 to 1913–14[2] produced a report
the affairs of the Dominions, summarizing the results of
correspondence of the secretariat, the chief events in
Dominions, and the legislation of the Dominions, provin
and States. It may be doubtful whether much inte
was taken in the Dominions in this venture, though s
use of the material printed was made in the United King
and occasionally in Australia. The later reports suff
from the lack of system on which they were edited,
to injudicious and inconsistent handling of the material.

It is not, therefore, possible to see what more could
been done by a composite secretariat on the type appare
desired by Mr. Deakin. It would have presumably wo
less well than one under an effective control. But t
is more to be said if the scheme of Mr. Lyttelton is t
as the real aim of such a secretariat. Mr. Lyttelton cl
distinguished between the secretariat and the Commis
and the former would have been supplied by the Imp

[1] *Parl. Pap.*, Cd. 5273.

[2] Ibid., 5135, 5582, 6091, 6863, and 7507. Practically all the m
in the last three and the most of that in the first two, exceptin
accounts of South African affairs and lists of Blue books, was
buted by the author of this work.

Government, and, since the head of it was also to be secretary to the proposed Imperial Council, the secretariat of Mr. Lyttelton's scheme would have corresponded with the present secretariat of the Colonial Office in its functions. The real difference is therefore not in the secretariat, but in the omission of the Commission, and much confusion seems to have arisen from this fact.

Viewed in the light of its real character, that of a Permanent Commission, it remains to ask what purpose the scheme would have served. No easy or obvious answer presents itself to this question. Apparently it has been contemplated by some of its supporters[1] as a somewhat large body, which would afford the means of setting up commissions to inquire into particular points: it has been suggested that ex-Governors, ex-Ministers, and ex-Agents-General might sit on it and lend their skill and knowledge. The proposal is attractive until it becomes necessary to apply it to any special case. If the topics which were enumerated above are considered, it will be seen that in most of them the Commission would have no scope at all for action: the question of treaties, for instance, is a question of the surrender of the authority of the Imperial Government by the admission of the Dominions to a share, and this is not a question which a commission is in the slightest degree competent to deal with. So was the question of the Imperial Court of Appeal: it was to treat of: the Imperial Government must advise what it will surrender to the Dominions, and it could not be helped by the advice of a miscellaneous band.

But, it will be objected, there are other topics which were eminently suitable for reference to a commission, the questions of uniformity of legislation in particular. It is really the crucial example of what a commission might be used for, and it is precisely in this regard that the uselessness of a commission becomes most apparent. The question of uniformity of copyright law arose in an acute form after 1908: is it to be conceived that the Dominions would have

[1] Hon. W. Pember Reeves, *Times*, May 24, 1909.

entrusted the consideration of a subject, which in its co
stitutional aspect formed one of the most serious difficult
for years, and in its domestic aspect depended entirely
local conditions, to the judgement of a collection or sele
tion of miscellaneous people established in London? Th
obvious answer is that they would do no such thin
Instead Canada sent to the United Kingdom special repr
sentatives for the purpose of expounding her views, an
this being a suitable case because of the personality of t
choice, the Commonwealth chose Lord Tennyson to spe
for it, showing that the existence of a commission is n
essential for an ex-Governor-General to be employed
he has special qualifications for the work. Or again, t
question of uniformity in the condition of admission a
practice regarding surveyors was dealt with in 1911 by
ad hoc conference, which proved abortive, but the subj
was clearly one which no collection of experts of the ordina
type could deal with. The lack of assimilation of pate
and trade marks laws is not due to any lack of advice
understanding of the issues in those cases where the sa
rules as in the United Kingdom have not been applie
it is due to local conditions, which are precisely what su
a body would not fully appreciate: if they were to
discussed, a conference *ad hoc* again would be the o
way to reach any real possibility of a result. Or is it seriou
supposed that any conference sitting in London co
without expert help from the provinces of Canada, dec
what they should do to their workmen's compensat
law? The differences between the British and the p
vincial law can be, and have been, set out in detail by
Imperial departments concerned; but the question is
of the differences or the arguments in favour of the Bri
law, but of the feeling of the province with regard to
question[1]. The same thing applies to company law.
Dominions have recorded for them in a beautifully c
form by the Board of Trade[2] the points in which t
laws differ from the laws of the United Kingdom, but t

[1] e.g. Ontario Act, 1914, c. 25; Cd. 7507, pp. 53–5. [2] *Parl. Pap.*, Cd.

are not all to be persuaded of the benefits, for local reasons of which they and no London Commission can judge. Reciprocal relief for deserted wives and children and mutual enforcement of judgements and awards of arbitration courts throughout the Empire are other subjects which might in theory be referred to such a commission, but which in fact could only be dealt with by a conference of legal experts from the provinces and States as well as the Dominions, and which are therefore best left to be dealt with by correspondence, which, however slow, is a good deal more rapid than the progress made by experts in reporting, while after their report their recommendations as a rule remain recommendations alone, or if carried out, are only so transformed after further correspondence.[1]

In some cases the correspondence method is the best: in others the use of conferences *ad hoc*, especially if the Dominions will allow their High Commissioners to sit upon them and so save time and delay. But all efforts to induce the Dominions thus to deal with the question of naturalization were a failure, so that the reception of a proposal to refer the matter to a permanent commission can be imagined. The question of wireless telegraphy was referred to the consideration of a committee, on which the High Commissioners for New Zealand and the Commonwealth sat, but as their two Governments would not do anything, their presence was not fruitful of much result. The questions of reduced cable rates were kept in his own hands successfully by the Postmaster-General: nor is it easy to see how confidential negotiations, such as his, could have been managed had they been put into the hands of a commission. On the other hand, the general question of the resources of the Empire were entrusted to a special Royal Commission, and it is inconceivable that the Dominions or the United Kingdom would have sacrificed to any permanent commission any control of the business.

The absurdity of the whole matter becomes still more

[1] Nothing has been done on the report of the Surveyors' Conference of 1911.

plain if it is considered how the commissioners are to
paid. No Dominion will consent to pay a salary to a n
who does no work and whom it does not control:
Dominion will entrust any matter to the consideration
an ex-Governor or minister or official, except for so
special cause in each case. Nor is the Imperial Governm
different in essence. The Commission would therefore
reduced to a panel of names of persons who wished
be asked to serve on conferences *ad hoc*, i.e. it would h
no real existence at all. This is clearly the result of
Lyttelton's express declaration that the functions of
body would be purely advisory, and would not superse
but supplement, those of the Colonial Office.

An alternative plan would seem to have been be
Mr. Deakin's mind, in which the secretariat and the Impe
Conference would have set themselves up in the Un
Kingdom as something superior to the Imperial Gov
ment, so that the secretariat would, in carrying out
resolutions of the Conference, have corresponded with
the Governments, including His Majesty's Government
an external body. The possibility of such a body
denied by Sir W. Laurier, who insisted that it mus
subject to ministerial responsibility, and there the ma
ended, and it must end. Apart from every other objec
the possibility of harmony in a body representing
different authorities is impossible, unless they all
one head and are organized in a hierarchy. If it
work at all, such a body would of course have some
to do, but it is clear that it would simply have the
work to do as the Dominions department of the Col
Office, but with no real standing to enable it to car
out. The mere question of how su body was to
municate with the provinces and States would sho
impossibility.

It is more than probable that the conception of the
manent Commission was due to the analogy of tariff
missions, such as at times in different countries are
a quasi-permanent life in order to report on tariff ano

and so forth. It may in 1905 have been thought that the next Conference would deal with tariff questions and that it would be desirable to have prepared for it a considered statement of the tariff position of the Empire, and after its deliberations were over to have a body to elaborate tariff proposals. For this purpose such a body might have been of some use, as tariff questions are habitually in the Dominions relegated to persons with no expert knowledge, and, the art of tariff-making for any but revenue purposes being lost in England, the congregation of a miscellaneous body of ex-Governors, ministers, officials, &c., might have been comparatively innocuous. But, seriously speaking, it is difficult to believe that any of those who have supported the proposition of a permanent commission have had any understanding of what the real meaning of such a proposal is.

The extraordinary confusion of thought prevalent on these topics was illustrated in a most interesting way in a memorandum put in before the Dominions Royal Commission on Natural Resources, Trade, and Industry, by the Empire Trade and Industries Committee of the Royal Colonial Institute. In that document the Committee suggested the establishment of a joint fund for the general purpose of Empire development, thus reviving the proposal of Mr. Deakin at the Conference of 1907, when he pointed out that it was difficult to carry out the schemes for the improvement of steamship and telegraph communications, which in principle had been approved. The main difficulty, he judged, lay in the absence of a representative body competent after the Conference to reduce such schemes to practical propositions by working out the technical details, ascertaining the cost and apportioning it among the Governments concerned. Mr. Deakin then suggested the voting of an annual contribution to a joint fund, to be administered by a joint board of representatives, whose duty it would be to prepare detailed schemes and estimates of projects submitted to its consideration by the Governments, who could then submit the proposals to their Parliaments. At the Conference of 1907 the objection was taken that it was

unconstitutional to vote in advance for an unspecified scheme, but that objection had disappeared in view of the action of the Government in the United Kingdom respecting the development grant. It was also objected that the proposed basis of contribution, one per cent. on the value of foreign imports, was inequitable, making the contribution of the United Kingdom on the figures of 1910 over £5,000,000 and that of Australia £155,000, while the population basis would make Australia's share over half a million. To avoid this difficulty the Committee suggested that each State could vote as much or little as it pleased, but if it voted nothing, the Board would be precluded from taking up any scheme which could not be adequately carried out without a contribution from that Parliament.

Suitable subjects for reference to such a board were, they suggested, the 'All-Red Route', the reduction of the Suez Canal dues, or the State-owned Atlantic Cable, or the question of the New Zealand Bill, aimed at excluding lascars from the shipping trade in New Zealand, or the Australian Bill of 1906, which proposed to confine the British preference to goods imported in ships manned by white labour, or the Merchant Shipping Bill of Australia, or the rebate question in South Africa. Further, cable rates, cable landing rights and wireless telegraphy might be placed under the control of the Board, which should act under the direction of the Governments, work out schemes, carry schemes into effect, suggest new schemes, and arrange and finance all mail and telegraph services involving subsidies from two or more Governments of the Empire, watch over commercial interests as affected by maritime communications, and report on any other subjects referred to it. A further memorandum insisted that posts and telegraphs were suitable subjects for control by a board, as there was no vital interest of Dominion autonomy involved, and Crown Colonies and the Government of India, which were being left out of account in the Imperial movement, could thus obtain equal footing with the Governments of the self-governing Dominions.

In reply to the Commission, it was explained that the

Board should send its schemes out to the various Governments, and should amend its schemes to meet any criticism made by the Governments. It would elect its own chairman, and it would be responsible to the Governments represented, each controlling its own representative. It would indeed be in a position somewhat analogous to the permanent bureaus created under the Brussels Sugar Convention, the International Telegraph Convention, and the Radio-telegraphy Convention, and would send its reports to the Secretary of the Imperial Conference for distribution to the members of that Conference.

Mr. Foster, the Canadian member of the Commission, inquired whether all that was proposed could not be effectively carried out by the secretariat of the Imperial Conference. It was argued in reply that the existing secretariat had failed to carry out the resolutions of the Conference, and that, though it might be altered, it would be a very difficult thing to do. It was admitted, however, on further cross-examination, that it would probably be better if the proposals were more restricted and the Board reduced to a standing committee, whose vital force would be the Imperial Conference, and which would content itself with placing in a concrete form proposals approved by the Conference.

On behalf of New Zealand, Mr. Sinclair laid great stress upon the difficulty of asking Governments to divest themselves of powers and functions which they at present had, and to hand them over to a completely new and irresponsible body. In reply, objection was taken to the description of the body as irresponsible on the ground that it had no power to spend money without the approval of Parliament in each case, and it was admitted that this involved the fact that there could be no practical result from any recommendation without the agreement by Governments and Parliaments. It was, however, argued that it threw the responsibility for failure directly on the representatives of the people of each Dominion and so was advantageous. Mr. Sinclair, however, pressed the view that, if the consent of Parliament were necessary, it was a waste of time to have recommendations

made until the Parliaments had first considered the questi
and pointed out that it was not necessarily, as was asserte
from any defect of organization that schemes had failed to
carried out, but for reasons which the Government concern
considered sufficient to preclude it from proceeding with t
schemes, and that the Governments already possessed su
cient means of their own for ascertaining the facts which t
Board would have to gather. He could not accept the vi
that such a body could give Governments greater guida
on important questions than what they could derive fr
their own resources; fundamental questions, such as whet
telegraphic or maritime communications should be regar
as merely commercial schemes, to be rejected if they co
not show profit, or accepted on political, social, and st
tegic grounds, were matters best fitted to be decided
Governments, nor would their discussion by an outside b
further matters. In the concrete instances adduced by
Committee the failure to act was clearly due to fundame
discrepancies of outlook, such as the position of the Bri
and the South African Governments on rebates, and
treatment of British Indians in shipping matters. It
out of the question that an outside body should
judgement on the action either of New Zealand or of
United Kingdom as regards the difficulty of the la
competition.

Other objections to the scheme were raised by the C
missioners, and it was suggested that no evidence had
adduced that the existing communications were not adequ
and still less evidence that the proposed method of dea
with them would be an improvement on the existing ins
mentalities. Stress was also laid on the difficulty of
proposal which assumed that a sum of money, estimate
six million pounds a year, would be contributed by Gov
ments for schemes which were later to be developed in d
and then resubmitted for the approval of the Parliame
The only reply which the Committee could offer was th
would be much easier to have money spent if the money
been voted, and was therefore in a sense ready for use.

that experience showed that certainly it was very difficult with the existing modes of procedure to attain any effect.

The whole argument is important, as it reveals the hopeless divergence of view between practical men of affairs and theorists. The fact that Mr. Deakin had all his life never mastered practical detail is precisely why his brilliance and his energy have resulted in nothing but words: men with far less ability have accomplished what he could never do. It is, no doubt, easy to see that the 'All-Red Route' is still in the air, nor is it difficult to proceed to the conclusion that some one is to blame, and that the person in question must be the secretariat. It cannot be too clearly recognized that the duty of a secretariat is not to carry out the building of steamships or any other operations of the kind: the secretariat is the instrument by which the necessary communications are made to the proper authorities as a result of resolutions arrived at by the Conference. It is the duty of the secretariat to know what the proper authorities are, and to see that they are supplied with all the material necessary for them to have before them in dealing with the questions sent to them for consideration. It is further the duty of the secretariat to see that the responsible authorities are induced, if possible, to make up their minds, primarily to carry out the resolution, but if not, to explain why they will not do so, and the secretariat is also under obligation to keep the various members of the Conference fully acquainted with what has transpired. More than these things it cannot do, and, if it could do, it would be usurping the Government of the Empire. In view of the inevitable determination of every known Government, and perhaps most of all of Dominion Governments, to put off any decision, the task of getting any notice taken of resolutions is not an easy one, and it says something for the efforts of the secretariat that the action to be taken by the Imperial Government is the action which is first and most effectively taken, as, for instance, after the last Conference, in the making of new treaties with the foreign powers willing to do so, the amendment of the constitution of the Judicial Committee, and the change in the

law of naturalization, the delay in considering which in t
past fourteen years has practically entirely been due to t
total inability of any Dominion Government[1] to reply
a dispatch without prolonged months either of anxio
thought, or more probably of searching for the misl
previous papers. So in the case of the 'All-Red Route' t
fact that it has never come to anything lies in the sim
reason that no proposals for the provisions of such a serv
as was desired in 1907 have ever been brought forw
which were from a financial point of view reasonable.
must be understood that these commercial suggestions
Imperial Conferences are essentially matters on wh
commercial considerations only can prevail: the id
advantages of an increased speed in the arrival of letters
Australia or New Zealand can easily be over-estimated,
at any rate, if they are held to be of the highest importa
by the Dominions, they will no doubt be prepared to
for them the necessary subsidies, without requiring
Imperial Government to indulge in expenditure which f
an Imperial view cannot be justified. Similarly, not o
have the Suez Canal dues been steadily reduced[2] almost ev
year, as a result of the pressure of the British Governm
but it is clear that the British Government has done ev
thing it can to secure this policy, at the expense of
Imperial Exchequer, and the Imperial Government
hardly be expected to be willing to pay further sums for
sake of giving rebates of dues, or whatever else may
contemplated, to British shipping, on the suggestion of
Board whatever. And why, may it be asked, should
Postmaster-General be prepared to forgo his control
postage and cable rates for the sake of the advantag
being hampered by the advice of a Board which *ex hypo*
would not consist of postal experts, unless those are t
ranked as experts whose activity consists in agitating
lower rates, while holding positions of no responsib
whatever?

[1] This can be seen by a glance at *Parl. Pap.*, Cd. 5273, giving the
spondence for 1907–10.

[2] *Parl. Pap.*, Cd. 6863, p

From quite a different standpoint a suggestion of some interest has been recently made, with a view to promote legislation on similar terms in matters of common interest in the Dominions and in the mother country. The occasion of the coronation of King George V was marked by the visit to the United Kingdom of a number of members of the Parliaments of the oversea Dominions, as guests of a Parliamentary Committee in the United Kingdom. The members were, of course, brought to England wholly in the capacity of guests, and they were not in any way engaged in official functions during their stay, which was arranged so as to give men, who might never else have had the opportunity, the chance of having experience of the life of the United Kingdom. It might not, it has been suggested, be impossible that on the occasion of the next Imperial Conference this precedent should be followed, but the members be encouraged to enter into discussions *inter se* of the questions debated at the Conference by ministers, or of similar questions, with a view to their better appreciation of the issues, when the Governments should, in due course, bring forward measures to give legal effect to resolutions of the Conference. The arrangement would only apply to such topics as were not party in character, such as measures requiring uniformity of legislation throughout the Empire. To this proposal the obvious objection, of course, is that mentioned above to many of the resolutions dealt with by the Imperial Conference. They are matters which are not the subjects of the legislation of either Canada or the Commonwealth, but pertain to the States or the provinces. On other questions such discussion might be possible, but technical matters such as copyright are very hard for private members of Parliament to follow, and are in practice left as a rule to the few who have, mainly from official experience, enough knowledge to discuss the questions. Moreover, it may safely be assumed that the jealousy with which those, who had been fortunate enough to be chosen to go to England, would be regarded by those not so fortunate would tend to make their views suspect and unacceptable. Various

modifications of the idea, to meet such object
no doubt be devised, but on the whole the pro
hardly to be consistent with the principles of
Government.

The events of the European War, however, h
increasingly clear that the immediate need is n
arrangements for leisurely consultations on matt
magnitude as for some mode of rapid commu
cases of the highest importance, and some mean
the Imperial Government more closely in tou
Governments of the oversea Dominions in the P
extraordinary difference between the attitude of
ment of Canada towards the war and that of Au
be observed by every one, and the consequence
of private if not of official friction which seems
The difficulty in the case of the Commonwe
lay in the fact that Mr. Fisher would not conse
a minister to the United Kingdom to discuss
insisted on the holding of a full Imperial Co
in the alternative, of the visit of an Imperial m
Dominions.[1] There was a certain lack of commo
this attitude which betokens the unripeness
opinion of Australia for an intelligent discussi
It should be obvious on the slightest considera
sending of an Imperial minister on a tour o
Australasian Dominions would be utterly imp
case of a minister of any consequence, and
a minister of no rank would be nil, while he w
lessly out of date in his personal knowledge o
the Government of the United Kingdom.
hand, an Australian minister in London would
possible first-hand information on the subje
freely communicate it to his fellow ministers fr
or week to week. The complaint that ther
real close co-operation in military matters
United Kingdom and the Commonwealth,
Commonwealth and New Zealand have not

[1] *Times*, May 22, 1915; contrast Mr. Hughes' wise

they are expected to do in the way of providing troops, is a compliment to the correctness of the attitude[1] of the Imperial Government, and the difficulty arises precisely from the present stage of the relations of the self-governing Dominions and the Empire.

It cannot be too clearly understood that, as these relations now stand—as a strong party in Canada under the guidance of Sir W. Laurier thinks that they should stand—the Dominions are in the position that, while through their forming part of the Empire they are liable to be involved in wars without their consent—as in the case of the present European War, though they made it clear that they hoped that the United Kingdom would fight, and though it is recorded that Australia, with her usual failure to understand the United Kingdom, feared that the United Kingdom would stand aloof from the conflict—yet in such a case they are under no obligation, other than what their own will imposes on them, to send any assistance to the United Kingdom. As an immediate consequence of this position, they have not the right to dictate the Imperial policy of the United Kingdom, for the simple reason that, if the result of the pursuit of such policy was war with a foreign power, the United Kingdom would be without any right other than a moral right to ask for the whole force of the Empire to be exerted in the war.[2] The position of Sir W. Laurier has been always abundantly clear in its exposition: he declined, in the Conference of 1911,[3] to press for the right of the Dominions to give advice on treaty matters, because advice meant that the Dominions should be willing to back up their advice with deeds, and Canada was not prepared to do so. If the Commonwealth desires to have the power to give authoritative advice on

[1] The intimation that the United Kingdom would take all the men sent by Australia was not a request, but an answer to a request for information: it therefore does not violate the rule as suggested in the *Round Table*, 1915, p. 865; for Canada see Sir W. Laurier's speech of Jan. 17, 1916.

[2] *Round Table*, 1915, p. 431. This involves, of course, the lack of reliance by the Imperial Government on the Dominions and lack of co-operation for joint action.

[3] *Parl. Pap.*, Cd. 5745, p. 117.

matters affecting the Empire, it would be necessary for t
Commonwealth to enter into such a relation with the Unit
Kingdom that the amount of aid which would be forth
coming from the Commonwealth could be definitely decid
upon and rendered available without question or dou
when the United Kingdom desired it. Such an arrangeme
which assured the Commonwealth the power of giv
authoritative advice, would essentially involve some sort
federation for purposes of defence and foreign policy
least: and, while, in such an arrangement, the Comm
wealth could give its advice as a matter of right, it could
of course, expect its advice to be taken if the majority
voices in the federal authority were against it. It is obvi
that with its small population, therefore, any such arra
ment would give no security to the Commonwealth tha
would obtain its ends, and therefore it is not at all wonde
that the idea of federation for defence as proposed by
J. Ward at the last Conference should have received s
consideration from Mr. Fisher.

The position, therefore, is that in offering advice
Commonwealth acts as one who is not necessarily prep
to back up his advice if need be, and, if prepared to d
is only prepared to send an indefinite amount of help, w
may be changed from day to day at his own pleasure.
position is one which need not in the slightest degre
considered as being discreditable to the Commonwea
the alternative would be to merge a portion of her auto
with the certainty of having a very faint voice in the deci
of the federal authority which might be set up. But, o
other hand, it is equally absurd to expect that the wish
a Dominion which stands in this relation to the U
Kingdom can necessarily always be given full effe
There is this error running through all the long protes
violent language of the Commonwealth and Dom
Governments regarding the attitude of the British Go
ment in the case of the New Hebrides and of Samoa.
position adopted by the Dominions was only justifiable
United Kingdom were in the position of an agent

Dominions, whose failure to carry out their wishes was matter for censure of the most severe kind. It is, of course, true that the allegiance of the Dominions to the Crown produces a very definite obligation on the part of the United Kingdom, namely, to preserve the Dominions from external aggression with the whole force of the Empire, so long, of course, as the Dominions do not themselves provoke a war, in which case the duty of the Imperial Government would disappear, and its action would fall to be decided by considerations of sentiment or honour or profit, alone or in combination. But this obligation, which the United Kingdom has never attempted to limit or repudiate in any way, is confined to the existing boundaries of the Dominions and to any changes in these boundaries made with the assent of the Imperial Government. It is not obligatory on the Imperial Government to quarrel with France over the New Hebrides, or, in the alternative, to sacrifice the population of the west of Africa for the sake of acquiring lands for Australia; nor is it the duty of the United Kingdom to annex territory merely because a Dominion would like it to be British. It is not out of place to add that the calm demand that territories should be annexed, while the Dominions alone interested will not even consent to pay for the cost, is one of those proposals which can only be understood on the system that it is never a mistake to ask for anything, since it is always possible it will be given, and asking does no harm. This should not be the position of a nation or would-be nation, and the folly of the Cape Government in refusing to pay for the administration of the territory which later became German was unquestionably the cause of the losses of the Union in its conquest of that country and of the rebellion which the presence of German troops on the border fomented. Nor was it until 1887 that the colonies of Australia realized that the annexation of British New Guinea meant that they must pay part at least of the cost of administration.

Further, the relation of the United Kingdom to the Dominions renders the Imperial Government unable to press the Dominions in any way for men or other assistance. It

can only wait for offers of service, and any pressure to t
Dominions to raise definite amounts of men would be unc
stitutional and would be open to the most severe censu
from the Dominions. Here is a clear case in which a D
minion minister in London could send to his Government t
information required in a proper form: he could say, af
consulting the Imperial Government, that the needs of t
situation were for every man available, and that, put
a practical form, the Imperial Government thought th
Australia or New Zealand might best contribute such a
such forces. The information would then be available
the hands of the Dominion Government in the best and m
effective form, conveyed by a minister and colleague of th
own as the result of information of the most authen
character, and at the same time put as no demand or ev
invitation, but an indication of the most effective serv
which could be rendered to the Empire. It is surely i
to argue that a formal Conference must be convened for t
sort of thing, especially when it is known that, when
proposal for convening such a Conference was pressed,[1] Ne
foundland was the only other Dominion which could ha
been represented, so that if the demand were taken litera
it meant that the Commonwealth wished an excuse to
that its wishes had been ignored, when it made deliberat
a demand for what could not, through no fault of the Uni
Kingdom, be conceded, because the other Dominions co
not be represented.

The great response of the Commonwealth to the necessit
of the situation, and its determination to give such aid a
can in the war, render it obvious that the question of
final settlement is one in which it will be deeply interest
especially, of course, in the hope that it will obtain, in case
victory, the German territories which it has occupied, a
some arrangement by which the New Hebrides can be secu

[1] By the *Round Table* in March 1915 (pp. 325–44) and by Austr
(*Times*, May 22, 1915). But cf. *Round Table*, 1915, pp. 670, 700,
where it is pointed out that some of Mr. Fisher's colleagues depre
a Conference.

to the British Crown. These are legitimate desires, and even if, as a matter of fact, the need of using the *Australia* to protect the expeditions from New Zealand to Samoa,[1] and from Australia to the German possessions in the north east, may have interfered with her activities in more important directions, still it was worth while securing the early success of these expeditions, which gratified natural, in the fullest degree the national wishes of the two Dominions and allowed them to see the fruits of war without its hardships, such as their men were shortly to face with such conspicuous courage in the Dardanelles. But the suggestion that there is the slightest chance of any final terms of peace being arranged without the consultation of the Dominions is one of the most idle imaginings ever invented in order to cause ill-feeling between the Dominions and the Imperial Government.[2] It seems, however, to be a belief implanted in the mind of the Australian that the root of all evils is the fact that communications with the Imperial Government pass through the Colonial Office, and, unless that sentiment is removed by the fact that in the Coalition Government a statesman born in the Dominion par excellence has held the seals of the Colonial Department, it may be a good reason for changing the channel of control of such communications to the hands of the Prime Minister. In the long run it is merely a question of rearrangement of duties which would be involved: a Prime Minister must definitely concentrate his work in certain channels, and must therefore always be put to the necessity of deciding what sides of business he is to deal with.

There is, it is fortunate, no sign in Canada or in South Africa of any uneasiness as to the Imperial action in the event of peace, nor has there been much indication of dis-

[1] *Parl. Pap.*, Cd. 7972, 7975.

[2] Mr. Hughes, the new Prime Minister of the Commonwealth, announced on November 4, 1915, that the Imperial Government had promised consultation, if possible, before peace terms are arranged, and visited London in March, 1916. Sir J. Ward and Mr. Massey and Sir R. Borden will also come in the course of 1916.

satisfaction with the Imperial Government in any rega
The presence of a minister in London and the visits of
Prime Minister have enabled Canada to keep in touch w
the progress of the war in a way which no other Domin
has been able to do, and in the case of the Union the co
dence reposed by the Union Government in their repres
tative in London, added to the close touch in which
Union Government have been able to keep with the Impe
Government through Viscount Buxton, whose place
an ex-minister of the Crown renders his help speci
valuable, have prevented the divergence of sentiment wh
seems to exist in the case of Australasia.

B[illegible]he exigencies of the war must raise for the n
serious consideration of all the Dominions the prob
what they are to do to keep in touch with the progres
foreign politics. It is no doubt true that in an emerge
there is scant time for consultation with the Dominions,
there would be time for consultation with a Domin
minister who was resident in London, and, if the mini
were, as he should be, in touch with his Government
with popular feeling in the Dominion, the views of
Dominion would have a chance of being expressed ef
tively: whether they prevailed or not would depend on
the circumstances of the case, nor does any Governmen
a Dominion seriously suppose that its views can alw
prevail. Nor short of a federation of some kind, even if
for defence and foreign policy, is there any other way wh
ever to keep in touch with foreign affairs.

It is, of course, a question whether the time has yet co
when the Dominion Governments, all or some, desire t
to keep in touch with foreign affairs. In Canada, from
proximity to Europe, there is clear proof that the desire
exist: it is expressed in the one form by Sir Robert Bor
in his desire to have the Dominion in the closest touch w
the heart of the Empire, and it is also expressed by anot
and less imperialistic quarter, Mr. Ewart, who avows tha
desires the declaration of the status of Canada as an in
pendent kingdom, because it would enable Canada to t

a part in international politics as a sovereign State. That is clearly not the wish of Sir Wilfrid Laurier, whose view has always been to press to its furthest conclusion the doctrine of the autonomy of the Dominion within the Empire, and who has never sought, so far as can be seen, to attain for Canada a position as a unit in international politics, except for fiscal matters; these are, of course, only indirectly political, for autonomy, real or qualified, in fiscal matters has been from time to time assigned to semi-sovereign States. It may be that the ideal of Sir W. Laurier has been independence of the Dominion in the fullest sense, but of that he has said nothing, and perhaps has thought nothing, content with establishing and extending in every sphere of action the doctrine that Canada is autonomous. But the position of Canada in its close proximity to London, is undoubtedly a fact of the greatest importance in its bearing on her relation to the United Kingdom, and, on the other hand, the intense suspicion of one another which seems to be a characteristic of ministers of Australasia may prevent the ready acceptance of the view that a resident minister would be a good idea. It is clear that the usual objection that such a minister would rapidly cease to be in touch with the Government at home has more weight in the case of Australasia than in that of Canada, but it could easily be arranged that the minister should vary from time to time.[1] The practice of appointing ministers without portfolios, which is even now not unknown in the United Kingdom, is a common practice in the Dominions, and there would, it seems, be no insuperable difficulty in allowing the post in London to rotate among the members of the Ministry. The question of salary would no doubt be a difficulty for a short time, since Dominion ministers receive, save in the Union, salaries of very small amount, but the position could be dealt with by frankly pointing out to Parliament that a minister must be provided with a reasonable sum and a London residence.

[1] It is most significant that, despite the appointment of an ex-Prime Minister as High Commissioner for Australia, to obtain close touch with foreign affairs, Mr. Hughes himself came home in 1916.

It might, it may be added, be possible to let the minist
supervise the work of the High Commissioner's office, and
perform the ornamental duties of that post, leaving th
Government free to fill the post with a really first-cla
business man, whether in or out of politics. It is obvious
not reasonable to expect a business man to have oth
qualifications for the work, and experience has shown th
the good man of business in the position of Agent-Gener
or High Commissioner is rarely good at other things. B
these are minor matters, and, though trifles count for mu
more in these questions than is often realized, still, if a D
minion is really anxious to have first-hand information
foreign affairs, and thus to be in touch with the progress
events in Europe and abroad, it will not find it difficult
adopt this device, as a stage perhaps to some more sat
factory condition. Constitutionally the offer of the Imper
Government is undoubtedly correct: it will willingly gi
information and weigh advice, but it retains responsibili
just as the Dominions retain their right to withhold or gi
aid in war, and to regulate as they think fit the amount
aid they will give, if it is accorded at all. On the other ha
while the Dominions are exposed to being involved by t
United Kingdom in war, they are assured of the full p
tection of the United Kingdom in such a war, and they enj
in peace the advantages which come from membership
a great Empire, without incurring any obligation to cont
bute to the cost of maintaining that Empire.

There is also a further question which must be solved
any final treatment of the constitutional arrangements of t
Empire. It must always be remembered that the positi
of the Empire par excellence, India, can no longer be ignor
in any decisions which are to be taken on such a matt
It is obvious enough that the long years of British rule
bearing in India their due fruit, and the folly of revoluti
aries should not conceal the fact that English education
producing an appreciation of western political ideals whi
alters inevitably the relations of the Imperial Governme
to the Empire. The Dominions cannot expect to share

the position formerly enjoyed without question by the United Kingdom, as the autocratic, if benevolent, controller of the destinies of the country. The self-consciousness of the people of India, as voiced by the inheritors of English political aspirations, would decline to accept the theory that Indian policy could be controlled in any way by the representatives of the Dominions, and this refusal would be completely justified, in view of the fact that the Dominions shut their doors on the admission of Indians, and accordingly treat Indians as such as inferiors, on ground of race alone. It is no answer to this fact that Indians, in their turn, regard Europeans as inferior on racial grounds: two wrongs do not make a right, and the United Kingdom fortunately is not impelled by economic considerations and by fear of a large Indian immigration to defend itself by an exclusion policy. On the other hand, it is absurd to demand that the Dominions shall alter their exclusion policy in any wholesale sense: to put forward this claim would be to ask the Dominions to commit social suicide, and therefore it is idle to urge the adoption of such a course of action. But, on the other hand, the modification of the present system so as to ensure free and undisputed entry, without humiliating formalities administered by underbred officials of low status and worse education, is a duty which is imperative on the Dominions in the interest of good neighbourship. Nor is it possible for a moment to defend the differential treatment on grounds of race of domiciled Indians. The fact that the influx of Indians must be stopped has nothing whatever in common with the question of the treatment of those already settled, and the policy of South Africa in this respect has been an extraordinary record of meanness. But on the other hand it is impossible to acquit the British Government of having missed opportunity after opportunity of solving the questions raised, though the greatest share of the blame must rest with Lord Milner, who thought it consistent with British honour to denounce the Transvaal Government for the wrongs of British Indians, and to propose to increase these wrongs by the legislation of a Crown

Colony, a policy which, in justice to Mr. Lyttelton, it shou
be noted that he firmly declined to sanction. Even lat
however, the opportunity presented by the remission of t
debt of £30,000,000, owed by the Transvaal to the Imper
Government, e guaranteeing of the £5,000,000 loan, a
the passing of the Union Act offered chances of interventi
of which the Imperial Government availed themselves w
a regrettable feebleness.

It follows inevitably that the Dominions cannot expect
be allowed to determine the destinies of the Empire of In
and from the point of view of the Imperial Government i
clear that in their general foreign policy they must exp
to have in future to consider the views of India with as m
care as they consider those of the self-governing Dominio
Their duty in either case is identical, and must be carried
without favour to either. It is inevitable, therefore, t
India should be allowed a voice in the Imperial Confere
just as any self-governing Dominion is allowed : it is ind
ludicrous to think that New Zealand, South Africa, and N
foundland are to be ranked as superior to the Empire
India : it is right, further, that that voice should be utte
by a representative of India other than the Secretary
State for India, and preferably by a member of the In
race. If the Dominion Governments recognize frankly
willingly this position, a great step in the effective consol
tion of the Empire in sympathy will have been gained,
there is no matter in which more easy and obvious prog
towards Imperial unity could be made, and that, too, w
out any formality or difficulty. The services rendere
India in the war afford an unparalleled opportunity for
recognition. Similarly, the definite abandonment of
foolish attitude of suspicion towards, and dislike of, Ja
manifested in Canada and Australasia, would be a
valuable outcome of the great advantage derived by
Allies from the support of Japan.

CONCLUSION

At the conclusion of this review of the chief facts affecting the relations of the Imperial Government and the Governments of the Dominions, it may be desirable to set out briefly the proposals which might in my opinion advantageously be carried into effect in the near future. I yield to no one in admiration of the splendid and legitimate ideal of bringing about a true union of the Empire, but I have as little faith in the possibility of its consummation at an early date as I have in the fruition of schemes of the permanent pacification of Europe or the effective control of foreign policy by democracy. To such a result there seems to me to be an insurmountable obstacle in the spirit of the self-governing Dominions, whether it be called the proud self-consciousness of national destiny or a narrow and short-sighted parochialism, or, as is more just, it be deemed a blend of both. In 1911 the offer of Mr. Harcourt on behalf of the Imperial Government to arrange methods of fuller consultation with the Dominions was answered decisively in the negative by the representatives of the Dominions other than New Zealand: his still more decided offer in 1912 to Australia, New Zealand, and the Union of South Africa to admit them, as Canada was to be admitted, to a more real share in the direction of the foreign policy of the Empire received a totally negative response: Australia preferred the cumbrous and ineffective machinery of the Imperial Conference, and the Union of South Africa hinted suspicion of any attempt at closer relationship. While the party of Sir Robert Borden has risen to the conception that the highest hope of Canadian greatness lies in the closest union on terms of equality with the United Kingdom, Sir Wilfrid Laurier, while lending to the cause of the United Kingdom in the great war the support of his unrivalled eloquence, remains as fully devoted as ever to the doctrine of the isolation of Canada and her

independence under the Imperial Crown. The great
will, we may assume, be a potent influence towards
unification of the Empire, but this influence, it is cert
will not be catastrophic, but will manifest itself gradu
and through a long space of time.

For the immediate future I suggest for the considera
of the Governments concerned in the Imperial Confer
the following principles :

1. That the Governors-General and Governors of
Dominions and the Governors of the Australian St
should be placed as regards legal liability for their off
actions in the same position as that now occupied by
Lord Lieutenant of Ireland.

2. That the Governors-General and Governors be requ
in the conduct of the Executive Government of the Domin
and States to observe the same principles in all resp
including the grant of a dissolution of Parliament, as
observed by the Crown in the United Kingdom.

3. That all personal responsibility on the part of Goverr
General and Governors in respect of the exercise of
prerogative of mercy should be removed.

4. That, while the supremacy of Imperial over Domi
legislation should be retained, the power of the Imp
Government by means of reservation and disallowanc
control Dominion legislation should be formally abando

5. That all legal restrictions on the powers of Domi
Parliaments to regulate merchant shipping should
removed ; that the extent to which Dominion legisla
authority should be exercised in respect of British ships
registered therein should be settled by constitutional ag
ments ; and that legislation should be passed to secure
enforcement in the several parts of the Empire of law
other parts, affecting ships registered in those parts, in
same manner as that in which the provisions of the Imp
Merchant Shipping Acts are enforced in respect of s
registered in the United Kingdom by all the courts throu
out the British Empire.

6. That means should be provided by which the cons

tions of the Dominions can, in so far as existing provisions in this regard are not already adequate, be altered by the authority of the people of the Dominions without reference to the Imperial Parliament.

7. That, in order to preserve the Judicial Committee of the Privy Council as a supreme court of final appeal for the Empire, it is essential that it should be given a real Imperial character by the inclusion among its membership of effective and continuous representation of the Dominions, and by the entrusting to it of the judicial appeals in the United Kingdom which at present are dealt with by the House of Lords.

8. That it is an essential condition for the attainment of Imperial unity that the Governments of the Dominions should take into their earnest consideration the means by which, while preserving essential homogeneity of race, free and unrestricted entry into their territories shall be secured to all educated British Indian subjects, and that all restrictions which are at present, on grounds of race or colour only, imposed on British Indians who are legitimately resident in the self-governing Dominions should be rescinded.

9. That, whenever desired by Dominion Governments, arrangements should be made for their representation at International Conferences, whether the objects of these conferences are political or not, by plenipotentiaries, nominated by the Government concerned and appointed by the King on the advice of the Imperial Government, constitutional agreements being made as to the mode in which the votes of such representatives shall be cast in cases where it is imperative that the action of the Empire shall be uniform, and the ratification of agreements concluded by such representatives resting with His Majesty on the advice of the Imperial Government acting in consultation with the Dominion Governments.

10. That the Dominion Governments should take advantage of the offers of the Imperial Government to afford them the fullest information with regard to, and as far as possible a share in the control of, foreign policy, and that

for this purpose it is desirable that there should be freque
visits to the United Kingdom of ministers of the Dominio
and that if possible each Dominion should be represent
continuously in London by a minister enjoying the f
confidence of his colleagues and of cabinet rank, whose du
it should be to keep his Government constantly and clos
informed of all matters affecting the foreign relations of t
Empire and to secure that the foreign interests of the Domini
shall be fully and completely represented to the Imper
Government.

11. That it is essential, in view of the experience of t
present war, that all defence should be conceived on
Imperial and not on a local basis, and that the control
defence which is properly desired by the Dominions shou
be attained in the form of a share in the control of the wh
defence forces of the Empire, and not as at present throu
the establishment of isolated local units.

These are only simple proposals, but they can claim
be practicable, as they are merely extensions of princip
already in operation, and they are not therefore exposed
the grave political and commercial difficulties which
attend any scheme of federation or commercial union.

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